

مركز القانون العربي والاسلامي
Centre de droit arabe et musulman
Zentrum für arabisches und islamisches Recht
Centro di diritto arabo e musulmano
Centre of Arab and Islamic Law

INTRODUCTION
TO ISLAMIC LAW
Foundation, sources and principles

Sami A. Aldeeb Abu-Sahlieh

Translated by
Felix J. Phiri
and revised by the author

This book can be ordered online at
www.amazon.com
2012

Centre of Arab and Islamic Law

Created in May 2009, the Centre of Arab and Islamic Law provides legal consultations, conferences, translations, research and it also offers courses concerning Arab and Islamic Law, and the relation between Muslims and the West. In addition, the Centre provides research assistance to students and researchers and also allows for the free downloading of documents from the website www.sami-aldeeb.com.

The Author

Sami A. Aldeeb Abu-Sahlieh. Christian of Palestinian origin. Swiss citizen. Doctor in law. Habilitated to direct researches. Professor of universities (CNU-France). In charge of Arab and Islamic Law at the Swiss Institute of Comparative Law (1980-2009). Visiting professor in different French, Italian and Swiss universities. Director of the Centre of Arab and Islamic Law. Author of many books, including translations of the Koran into French, English and Italian. The current work is an English translation of his book: *Introduction au droit musulman: fondements, sources et principes*, also available in Italian: *Introduzione al diritto musulmano*. Both books can be ordered online at Amazon.

The Translator

Felix J. Phiri. Zambian of origin. Member of The Society of Missionaries of Africa (The White Fathers). Did his licentiate at the Pontifical Institute of Arabic and Islamic Studies (PISAI). Obtained his PhD at SOAS in 2006 and has since been teaching Islamology at PISAI in Rome (www.pisai.it) and at Dar Comboni in Cairo. Director of *Etudes Arabes* published by PISAI. Author of *The resurgence of Islam in Zambia* and several articles about Islam in Zambia. Linguistic revisor of the Koran according to the chronological order by Sami A. Aldeeb Abu-Sahlieh, the version used for all the Koranic quotations in this book.

Editions

Centre of Arab and Islamic Law

Ochettaz 17

Ch-1025 St-Sulpice

Tel: 0041 [0]21 6916585

Mobile: 0041 [0]78 9246196

Website: www.sami-aldeeb.com

Email: sami.aldeeb@yahoo.fr

© All rights reserved 2012

Summarized Table of Contents

Summarized Table of Contents	3
Introduction	7
Part I. The legislator	9
Chapter I. Legislative competence belongs to God	9
Chapter II. The role of the State and legal schools	22
Chapter III. Maintaining laws of other communities	47
Part II. Sources of Islamic law	53
Chapter I. The Koran	54
Chapter II. The <i>Sunnah</i>	111
Chapter III. The <i>Sunnah</i> of the companions of Muhammad	129
Chapter IV. The <i>Sunnah</i> of the people of the house of the Prophet	132
Chapter V. Laws revealed before Muhammad	134
Chapter VI. Custom	142
Chapter VII. Rational effort (<i>ijtihad</i>)	147
Chapter VIII. Tools of rational effort (<i>ijtihad</i>)	180
Chapter IX. Rules and juridical adages	199
Part III. Implementation of the norms	211
Chapter I. Conflicts between sources	211
Chapter II. Linguistic interpretation	226
Chapter III. Objectives of Islamic law	246
Chapter IV. The content of the norm	256
Chapter V. The addressees and beneficiaries of norms	269
Chapter VI. The mitigation of the norm	282
Part IV. Implementation of Islamic law in time and space	321
Chapter I. Implementation of Islamic law in Muslim countries	321
Chapter II. Implementation of Islamic law outside Muslim countries	367
Part V. Analytical legal table of the Koran	391
Bibliography	433
Table of contents	453

General observations

Transliteration

Different methods of transliteration (romanization) of Arabic exist. We have avoided the more scholarly method in order to facilitate easy reading for the non-specialists in this field. Hence, some of the Arabic letters have been transliterated as follows:

'	=	ع + ء	gh	=	غ
kh	=	خ	u + w	=	و
d	=	ض + د	i + y	=	ي
dh	=	ظ + ذ	t	=	ط + ت
sh	=	ش	h	=	ح + هـ
s	=	ص + س	j	=	ج

In the footnotes and in the bibliography, the name of the same author is written in two different ways, depending on whether the book is in Arabic or whether it is a translation (e.g. Khallaf and Hallaf, Al-'Ashmawi and Al-Ashmawy, etc.). However, for the sake of consistency, we have opted for the transliterated form in the main text.

Quotations from the Bible and the Koran

Biblical quotations are based on the New Revised Standard Version, as found on the website <http://www.godweb.org/nrs/index2.htm>, but the numbering corresponds rather to that of the Jerusalem Bible. Koranic quotations are based on *the Koran, Arabic text with the English translation according to the chronological order of the Azhar and with reference to variations, abrogations and Jewish and Christian writings*, by Sami A. Aldeeb Abu-Sahlieh. The chapter numbering comprises two figures separated by a slash, the first one refers to the chronological order of the Azhar and the second one to the usual classification of the chapters. Hence, 72/14, in reference to the Chapter *Ibrahim*, signifies Chapter 72 by chronological order and Chapter 14 according to the usual classification.

Footnotes and bibliography

The book is based mainly on the courses taught in the various faculties of law and faculties of Islamic law in Arab countries, complemented by the positions of liberal Muslim thinkers. In order to avoid encumbering the footnotes unnecessarily, we have provided a list of the said courses at the beginning of the bibliography. Footnotes either refer specifically to quotations or give supplementary and explanatory information. The bibliographical data in the footnotes comprise the name of the author and/or the first elements of the title of the quoted works. The rest of the information is found in the bibliography. Unless otherwise specified, the dates which appear in this book refer to the Christian Era (CE). We have indicated as much as possible the date of the death of the personalities referred to, in the text as well as in the bibliography, in order to situate them historically. For example, Abu-Hanifah (d. 767).

Abbreviations

Ac	Acts of the Apostles
Col	The Letter of St. Paul to the Colossians
d. (ca)	Died (<i>circa</i>)
Dt	Deuteronomy
Ex	Exodus
Ga	The Letter of St. Paul to the Galatians
Gn	Genesis
GSCC	Gulf States Cooperation Council
H	Era of the Hegira (Muslim calendar)
UDHR	Universal Declaration of Human Rights
Is	Isaiah
Jn	The Gospel according to St. John
Jon	Jonas
Lk	The Gospel according to St. Luke
Lv	Leviticus
Mt	The Gospel according to St. Matthew
O.I.C.	Organization of the Islamic Cooperation
Rm	The Letter of St. Paul to the Romans
S.a.	No author
S.d.	No date of publication
S.l.	No place of publication
S.ed.	No name of publisher

Introduction

A comprehensive demographic study of more than 200 countries indicates that there are 1.57 billion Muslims of all ages living in the world today, representing 23% of an estimated 2009 world population of 6.8 billion. They live mainly in the fifty-seven countries which are members of the Organization of the Islamic Cooperation (O.I.C.).¹ However, more than 300 million Muslims, that is, one-fifth of the world's Muslim population, live in countries where Islam is not the majority religion.²

Muslim communities in countries where they have been previously a minority are in net increase due to the migratory flux, higher birth-rates among Muslims in comparison to non-Muslims, mixed marriages (the children ensuing from such marriages being presumed Muslims by birth) and conversions. In France, Islam is now the second most important religion, right behind Catholicism, surpassing thus Protestantism and Judaism. The prohibition of conducting census based on religious affiliation renders it difficult to provide exact figures of their numbers. However, they are estimated to be between two and six millions, out of a population of approximately sixty-five million inhabitants.³

Of late, Islamist movements in the Arab and Muslim countries have been asking for the total implementation of Islamic law as a fundamental component of Islamic faith. Increasingly, Muslim minorities in the West are also making claims aimed at adapting the laws of the host countries to their religious demands. Such attempts are not without problems due to contradictions between *Shari'ah* (Islamic law) related norms and some elements of Human Rights as defined by international documents.

To understand these claims and the problems they pose, one has to understand the principles of jurisprudence (*usul al-fiqh*), a module prescribed for all the students of religious and legal sciences in the Arab and Muslim countries. Without such knowledge, dialogue between Muslims and non-Muslims would lead to an impasse and to incomprehension.

In analogy to a tree comprised of roots and branches, Islamic law is divided into two parts.

- *Usul al-fiqh* (principles or roots of jurisprudence): this part responds to the following questions: Who is the legislator? Where is the law found? How can one understand the law? What is its content? What is its objective? Who are the addressees and the beneficiaries of the law? Is the law applicable at all times and in all places? Al-Shafi'i (d. 820) is regarded as the pioneer of the science of *usul al-fiqh*, through his famous work *Al-risalah*.⁴

¹ See the list in http://www.oic-oci.org/member_states.asp.

² <http://www.pewforum.org/Mapping-the-Global-Muslim-Population.aspx>.

³ <http://www.lefigaro.fr/actualite-france/2011/04/05/01016-20110405ARTFIG00599-france-comment-est-evalue-le-nombre-de-musulmans.php>.

⁴ See bibliography for the Arab version and the English and French translations (under Shafi'i).

- *Furu' al-fiqh* (branches of jurisprudence): this part deals with the relationship between human beings and Allah, *'ibadat* (profession of faith, prayer, legal alms-giving, fasting during Ramadan and pilgrimage) and their relationship with one another, *mu'amalat* (family law, inheritance law, contracts, criminal law, State organization, international relations, war related questions, etc).

In this book we are only concerned with the principles of jurisprudence (*usul al-fiqh*), while incidentally having recourse to their applications in the domain of branches of jurisprudence (*furu' al-fiqh*). As already stated above, the work is based on the courses taught in the various faculties of law and faculties of Islamic law of Arab countries. The courses represent the teachings of classic Muslim authors and reflect the official point of view of Muslim religious authorities, more so that of the States on which these faculties depend, without taking into account the debate stirring up the Muslim society. For this reason, we have sought to complement them with works written by Muslims outside the institutional framework. This will help the reader to appreciate the evolution of the Muslim thought in the concerned countries.

The book is mainly addressed to lawyers, theologians, politicians and employees of governmental and non-governmental organizations involved with Muslims. However, as questions regarding Muslims have come to occupy more and more space in the media, the work is also addressed to the general public.

Certainly, the work will not be to the satisfaction of everybody. Nevertheless, the author remains open to any further constructive remarks of the readers, Muslims and non-Muslims alike.

We wish to express our deepest gratitude to Professor Felix J. Phiri for his excellent translation. Our gratitude also goes to Margaret Slynn and Marlis Naef for their meticulous proofreading and constructive suggestions. We remain, however, solely responsible for mistakes and opinions expressed herein.

Part I.

The legislator

The first question Muslim jurists ask themselves is of a theological and philosophical nature: Who is the legislator? The answer to this question guides the whole of the Muslims' thought and it is the basis of Muslim demands both in Islamic and Western countries.

Chapter I.

Legislative competence belongs to God

I. The divine origin of law

There are three manners of conceiving law:

- as an emanation of a dictator;
- as an emanation of the people, by a direct or indirect democratic process;
- as an emanation of a divinity, either directly through prophetic revelation, or indirectly through religious leaders, the presumed representatives of the divinity on earth.

The concept of law as an emanation of a divinity is the approach adopted by Jews and Muslims, to mention but these two. Such a concept is almost non-existent among Christians. In order to show the conceptual differences between Jews, Christians and Muslims, we need to briefly present their points of view.

1) The Jewish concept

For the Jews, the law is to be found in the Bible, notably in the first five books attributed to Moses, the Torah. Moses was a Head of State and he was, in this capacity, supposed to govern the society of his time. He did so not in his own name, but in the name of the divinity that had inspired his law. The revealed law imposes itself on the Jewish believer at all times and in all places.

The Jewish Bible is supplemented principally by the *Mishnah* (written between 166 CE and 216 CE) and its commentary, the *Talmud* (composed of two versions: the Jerusalem one, written in Tiberias and finished towards the end of the 4th century CE; and the Babylonian one, written in Babylon around the 5th century CE). *Mishnah* and *Talmud* are regarded as the Jewish oral Bible and they contain the teachings of the Jewish religious leaders. The Bible gives some indications of the Jewish concept of law:

You must diligently observe everything that I command you; do not add to it or take anything from it (Dt 12:32).

The secret things belong to the Lord our God, but the revealed things belong to us and to our children for ever, to observe all the words of this law (Dt 29:28).

It is a statute for ever throughout your generations in all your settlements (Lv 23:14).

Evoking these verses, Maimonides, one of the greatest Jewish theologians and philosophers who died in Cairo in 1204, wrote: "It is clearly stated in the Torah itself that it contains the Law which stands for ever, which may not be changed, and nothing may be taken from it or added to it." He who pretends the contrary, according to Maimonides, "shall die by hanging." The same punishment is also meted out to the one who "uproots any... verbal traditions" just as it is for the one who gives an interpretation that is different from the traditional one, even if he produces the sign that he is a prophet sent by God.¹

2) The Christian concept

Although he belonged to the Jewish tradition, Jesus was less inclined to respect the laws laid down by the Bible.

When the Scribes and the Pharisees brought before him a woman caught committing adultery *in flagrante delicto* and asked him what he thought about the application of the penalty of stoning to death as prescribed by the law of Moses (cf. Lv 20:10; Dt 22:22-24), he replied: "Let anyone among you who is without sin be the first to throw a stone at her." As they all left without anyone daring to throw a stone at her, he said to the woman: "Neither do I condemn you. Go your way, and from now on do not sin again" (Jn 8:4-11). On another occasion, someone said to Jesus: "Teacher, tell my brother to divide the family inheritance with me." Jesus answered him: "Friend, who set me to be a judge or arbitrator over you?" and he added for the sake of the audience: "Take care! Be on your guard against all kinds of greed; for one's life does not consist in the abundance of possessions" (Lk 12:13-15). His abolition of the law of retaliation was equally significant (Cf. Mt 5:38-39). We can also recall here his celebrated phrase, the one on which is based the separation between religion and State: "Give therefore to Caesar the things that are Caesar's, and to God the things that are God's" (Mt 22:21).

Due to a lack of a sufficient number of juridical norms in the Gospels and in the letters of the Apostles, the Christians had to resort to the Roman law which the jurist Gaius (d. ca. 180) defined as being "that which the people prescribe and establish" (*Lex est quod populus iubet atque constituit*).² The modern democratic system is based on this concept of law.

3) The Muslim concept

The message of Muhammad advocates for a return to the biblical concept of law, with which it shares many norms (e.g. the law of retaliation: 87/2:178-179 and 112/5:45). Muslim jurists use the term "legislator" (*hakim*) exclusively to designate God. He is the only one who can prescribe laws.

This concept is determined by the Koran itself, which states that:

¹ Maimonides: *The book of knowledge*, p. 23-24.

² Gaius: *Institutes*, I.3.

Say: "I have a proof from my Lord, and you belied it. What you hasten does not depend on me. The judgment belongs only to God. He narrates the truth and he is the best of deciders" (55/6:57).

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

According to the Koran, God determines what is licit and what is not:

Do not say, in accordance with the lies uttered by your tongues: "This is lawful and this is unlawful, in order to forge lies against God. Those who forge lies against God do not succeed (70/16:116).

O you who believed! Do not forbid the good [things] that God permitted you, and do not transgress. God does not love the transgressors! Eat the permitted and good things God provided you. Fear God in whom you believe (112/5:87-88).

Quoting verse 55/6:57 mentioned above, Khallaf writes:

Muslim religious scholars unanimously acknowledge that God is the Supreme Legislator. He is the source of all the prescriptions, be they explicitly expounded in the texts revealed to his prophets, notably to Muhammad, or extracted or deduced [from sources of law] through analogy by the scholars.¹

The concept is also illustrated by Muhammad's own attitude towards a case of adultery similar to the one Jesus was confronted with. A man and woman, both Jews, were brought before Muhammad after having been caught committing adultery *in flagrante delicto*. He inquired about the penalty prescribed by the Bible. The Jews informed him that the Bible prescribed stoning the culprits to death in such cases (Lv 20:10; Dt 22:22-24) and that the community had, however, decided to change the norm because it was applied only to the poor. Instead of the prescribed penalty, the community chose to smear the faces of the adulterers with black charcoal before leading them ahead of a procession and flagellating them, regardless of their social status. Muhammad disapproved of the modification and considered himself duty-bound to re-establish God's norm. He then recited the Koran: "Those who do not judge by that which God descended, those are the perverse" (112/5:47).²

Etymologically, the term *Islam* signifies submission. It is the name that was given to the religion of the followers of Muhammad. They are called *al-muslimun* (those who submit). Thus, Islam prescribes total submission to the will of God as expressed in the Koran and in the *Sunnah*, two principal sources of Islamic law, which we shall discuss in the subsequent chapters. In this respect, the Koran says:

Those who do not judge by that which God descended, they are the disbelievers, [...] the oppressors, [...] the perverse (112/5:44, 45, 47).

¹ Hallaf: *Les fondements*, p. 145.

² See Muslim, hadith 3212; Al-Tirmidhi, hadith 3157; Abu-Da'ud, hadiths 3857 and 3858; Ibn-Majah, hadith 2548; Ahmad, hadiths 2250, 4437 and 17794.

It is not for a believer man or woman, when God and his messenger have decided on a matter, to claim freedom of choice in their matter: whoever disobeys God and his messenger is manifestly misguided (90/33:36).

The saying of the believers, when they are called to God and his messenger so that he may judge between them, is only to say: "We heard and obeyed" (102/24:51).

Eight centuries after Maimonides (d. 1204), Shaykh Muhammad Mitwalli Al-Sha'rawi, an Egyptian religious and political figure who died in Cairo in 1998, upheld practically the same concept of law as his Jewish compatriot. He explained that revelation intervened to resolve questions susceptible to divergence, thus liberating humanity from the agonizing constraint of having to resolve them by argumentative deliberation or by wearisome repetitive experiences. A Muslim does not have to search for solutions to his problems outside of Islam, since Islam offers absolute solutions that are eternal and good.¹ He affirms:

If I were the person responsible for this country or the person in charge of applying God's law, I would give a delay of one year to anyone who rejected Islam, granting him the right to say that he is no longer a Muslim. Then I would apply Islamic law to him by condemning him to death as an apostate.²

The death-threat issued by Al-Sha'rawi was not simply rhetorical. The Libyan judge, Mustafa Kamal Al-Mahdawi was dragged into justice for many years because of his book *Al-Bayan bi-l-Qur'an* (Proof by the Koran)³ which put into question the *Sunnah* and some Islamic norms. The Court of Appeal in Benghazi acquitted him on 27 June 1999, probably for political reasons, and prohibited the distribution or the reprinting of his book. Rashad Khalifa, who also put into question the *Sunnah*, was labelled apostate, but he was less fortunate than Al-Mahdawi; he was assassinated in 1990.⁴ Muhammad Mahmud Taha, founder of the *Republican Brothers* in Sudan, advocated for a theory according to which only the first part of the Koran, i.e., the part revealed in Makka, was binding because the second part revealed in Medina was dictated by conjunctural and political factors. He was condemned to death by a Sudanese tribunal and hanged on 18 January 1985.⁵ Faraj Fodah was assassinated on 8 June 1992 by a Muslim fundamentalist for having criticized, through his writings, the implementation of Islamic law. Professor Abu-Zayd (d. 2010) attempted a liberal interpretation of the Koran while he was still a professor at the University of Cairo. A fundamentalist group filed a lawsuit against him for apostasy. The case was referred to the Supreme Court, which confirmed his condemnation on 5 August 1996,⁶ and called upon him to divorce his wife, since an

¹ Al-Sha'rawi: *Qadaya islamiyyah*, p. 35-39.

² *Ibid*, p. 28-29.

³ Al-Mahdawi: *Al-bayan bil-Qur'an*.

⁴ Rashad Khalifa developed this theory in his book: *Quran, hadith and Islam*.

⁵ For more information on this Sudanese author, see Aldeeb Abu-Sahlieh: *Droit familial des pays arabes*, p. 39-41. Text and commentary of the judgment in Kabbashi, p. 80-96 (the author is the judge who condemned Taha).

⁶ The decision was published in *Al-Mujtama' al-madani* (Cairo), September 1996.

apostate cannot marry a Muslim woman. The couple had to escape from Egypt and seek political asylum in Holland, out of fear for their lives.

The obligation of implementing Islamic law, with the risk of fatal consequences in case of refusal, can cover an unlimited amount of material, which can even be very controversial. To give another extreme example, Jad-al-Haq (d. 1996), the Shaykh of Al-Azhar, had declared in a *fatwa* issued in 1994:

If a region, out of a common accord, ceased to practice male and female circumcision, the Head of State should declare war against it because circumcision is part of the rituals of Islam and its particularities. This means that male circumcision and female circumcision are obligatory.¹

4) Absence of the concept of the sovereignty of the people

The above-mentioned Muslim perception of law has the corollary of the absence of the concept of the sovereignty of the people among Muslims, a key concept for any democracy.

Al-'Ayli, a contemporary author, categorically rejects the idea that legislative sovereignty can be attributed to the nation; it belongs to God alone. He writes in this regard: "The nation within the Muslim context can never contradict the text of the Book or the *Sunnah*, nor decide upon an act whose conditions would contradict them, whatever the degree of the unanimity of the leaders of such a nation... Islam knows no organ whose point of view prevails over others in case of dispute. It recognizes neither majority nor minority. One can never have recourse to the national public opinion as the source of power [...]. One can only have recourse to God and to his Messenger. The nation and its leaders do not have legislative power; they can only refer themselves to God and to his Messenger in deducing norms."²

The State, in this case, has for task the implementation of Islamic law, the one that God has ordained to be observed. It cannot repeal this law since, being divinely revealed, it can only be abrogated by another revelation,³ according to the theory of the hierarchy of norms.⁴ By consequence, even though many Muslim countries have abandoned Islamic law, partly or totally, they have not been able to repeal it. They have only managed to marginalize it, with the constant risk of seeing it resurface in the future.

Muslim authors who dare discuss the sovereignty of the people hasten to point out its limits:

- If the question to be resolved concerns an authentic and clear text of the Koran or the *Sunnah*, people cannot but submit themselves to it; i.e., they cannot establish a contrary law in its stead.

¹ See Aldeeb Abu-Sahlieh: *Khitan*, annex 6.

² Al-'Ayli: *Al-hurriyyat*, p. 214-216.

³ 'Odah: *Al-Islam wa-awda'una al-qanuniyyah*, p. 62.

⁴ According to this theory, a norm can only be abrogated by a norm of an equal or superior value. The revealed law being superior to any human law, it can only be abrogated by a law revealed later.

- If the meaning leads to different interpretations, people can attempt to find a solution based on the comprehension of the text, preferring one interpretation to the other.
- In the absence of the text, people are free to establish the norm they deem appropriate for themselves; on condition that such a norm respects the spirit of Islamic law and its general rules and that it does not contradict another Muslim norm.¹

Given what precedes, we can say that the more a sacred book is impregnated with laws, the more it is restrictive for its followers, depriving them of the possibility of managing their life according to their own choices. The Koran was aware of the difficulties it had brought about by imposing new norms:

O you who believed! Do not ask about things that if they are shown to you would harm you. If you ask about them, when the Koran is descended, they will be shown to you. God pardoned [you] for them. God is forgiver, magnanimous (112/5:101).

It is worth noting that Muslim authors believe that Islamic law, as an emanation of God, is complete and perfect. Professor Mahmud Al-Khaldi presents, as a proof, the following verse: "We descended on you the book, as a manifest [explanation] of everything, a way, a mercy and an announcement to the submitters" (70/16:89). In addition, he quotes the exegete Al-Tabari (d. 923): "[It] is all that people need in terms of the knowledge concerning what is licit and what is illicit, what is retributive and what is punishable." He further quotes the Koran: "Today, I perfected for you your religion, and fulfilled my favour upon you. I accepted Islam as religion for you" (112/5:3).²

The difference between the Western and the Muslim concept of law is well reflected in the notion of human rights. The Universal Declaration of Human Rights (UDHR) and other international documents, primarily of Western, inspiration do not mention God. All attempts at any reference to him in these documents have failed. This has not been the case with regard to Muslim declarations in relationship to human rights.³ For instance, the one promulgated in 1981 by the Islamic Council (whose Headquarters is in London), affirmed repeatedly that human rights are founded on the divine will. The first paragraph of the preamble states: "Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice." The considerations of the preamble⁴ add:

- Strong of our faith in the fact that God is the sovereign master of all things in this immediate life as in the ultimate life...

¹ Abd-al-Karim: *Al-dawlah wal-siyadah*, p. 227-228; Ali: *Mabda' al-mashru'iyah*, p. 216-224.

² Al-Khaldi: *Naqd al-nidham al-dimuqrati*, p. 156-157.

³ The Arab and Muslim countries has elaborated several declarations in relation to human rights, some of which claim to be in conformity with Islamic law. The reader will find a complete translation of the eleven declarations in Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, annexes 1-11, p. 462-522.

⁴ We use here the Arabic version of the Declaration.

- Strong of our conviction that human intelligence is incapable to elaborate a better way in view to assure service of life without God's guidance and revelation:

We, Muslims,... we proclaim this Declaration of Human Rights made in the name of Islam, as one can understand them of the very noble Quran and the very pure Prophetic Tradition (*Sunnah*).

Therefore, these rights present themselves as eternal rights that cannot be suppressed or rectified, abrogated or invalidated. These rights have been defined by the Creator - to him the praise! - and no human creature has the right to either invalidate or attack them.

II. Can man make laws?

To make a law is to determine what is good and what is bad, what must be observed and what must be avoided. Muslim jurists and philosophers posed the question of knowing whether man, through reason, is capable of this or whether on the contrary he needs divine intervention to guide him in his judgments. There exist three trends of thought among Muslims with regard to the question: Mu'tazilite, Ash'arite and Maturidite:

The Mu'tazilites, whose leading figure was Wasil Ibn-'Ata (d. 748), affirm that beauty and ugliness are inherent to the nature of every action; the two are neither the effect of legislation, nor are they established by it. Legislation, they say, sets off an action because it is beautiful in itself (by its own nature). Beauty and ugliness proceed from human reason, which is their cause and judge. Reason obliges us to consider things as they are, in spite of the silence of the law. God has the duty of prescribing for humankind acts that are advantageous and salvific for it. Law does nothing other than to register and to indicate acts which human reason characterizes as beautiful or ugly. Based on this principle, the Mu'tazilites consider that people who have not received the religious message are as responsible for their acts before God as the people who have done so. They will answer before God for the good and the evil they accomplished. However, some acts go beyond reason and it is only revelation that can qualify them as good or evil. For that matter, it is divine revelation that determines fasting and prayer and their state of validity.

The Ash'arites, whose leading figure was Abu-al-Hasan Al-Ash'ari (d. 935), say that human reason, when abandoned to itself, is incapable of knowing and comprehending divine decrees. Man has to be assisted by the messengers of God who explain the decrees to him. The sending of the prophets and messengers is therefore necessary, because they alone can teach us how to know the judgment of God and how to obey his will. Human reason varies from one person to another in making judgments. Sometimes, it is inconsistent within the same subject; what appears to be good and just at one moment may appear evil and unjust in another moment. Inconsistency, to which can be added the influence of passion and sentiments, forbids us from seeing that what our reason judges to be good, God also judges it good, and vice-versa. Consequently, humankind can answer for his acts before God only after he has received the divine revelation through a prophet or a messenger. Thus, if a person or a society has received no revelation, and lives isolated from the

rest of the world, he is not answerable before God for the good or the evil he accomplishes. He will neither be recompensed nor punished. This is the case for the people who lived before the advent of religions. The Koran says in this regard: "And we were not to punish until we send a messenger" (50/17:15).

The Maturidites, whose leading figure was Abu-Mansur Al-Maturidi (d. 944), preconize a middle way between the two trends. They acknowledge the recourse to reason in distinguishing good from evil, but they also add that reason cannot be the standard of measure because people differ over its qualification; reason is not the same for all and cannot constitute a unique standard of measure for all. Even if one can acclaim an act as being good and disapprove of another as being evil here on earth, it is not certain that the judgment imputed on such acts in this life will be so in the Hereafter. The divine message brought by the prophets is therefore necessary to make up for the weakness of human reason and to distinguish good from evil, in accordance with the divine will.

Commenting on these three trends of Muslim thought, Khallaf (d. 1956) wrote:

The differences in the appreciation of the role of reason are consequential only with regard to people who have not received revelation. In fact, religious scholars unanimously believe that for the others it is the prophetic message and not human reason that constitutes the permanent criteria for distinguishing good from evil: a good act is the one ordained and recompensed by God and the evil one is the one that is forbidden and punished [by God].¹

This signifies that law in Muslim society cannot be the work of human beings, but of God alone. This debate raises the question of the necessity of prophets in the governing of society.

Ibn-Khaldun (d. 1406), a Muslim philosopher with a materialistic outlook, was the first among Muslims to accept the possibility of the existence of a secular power governed by laws made by wise men, and therefore not revealed through the prophets. He arrived at this conclusion through personal observation. During his time, he noted that societies which did not have religious laws were a lot more numerous than those which did have them. Yet these societies were prosperous and not at all anarchic. He concluded therefrom that theocratic authority was not indispensable for the behaviour of men in society.² He nonetheless made an exception for the Arabs:

Arabs can obtain royal authority only by making use of some religious colouring, such as prophecy, or sainthood, or some great religious event in general. The reason for this is that because of their savagery, the Arabs are the least willing of nations to subordinate themselves to each other, as they are rude, proud, ambitious, and eager to be the leader. Their individual aspirations rarely coincide. But when there is religion (among them) through prophecy or sainthood, then they have some restraining influence in themselves. The qualities of haugh-

¹ Hallaf: *Les fondements*, p. 148.

² http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter1/Ch_1_01.htm.

teness and jealousy leave them. It is, then, easy for them to subordinate themselves and to unite.¹

The Koran seems to confirm Ibn-Khaldun's point of view:

He rallied their hearts. If you had spent everything that is on the earth, you could not have rallied their hearts; but God rallied them. He is mighty and wise! (88/8:63).

Seek protection with God's rope all together and do not separate. Remember God's favour on you. When you were enemies, he rallied your hearts. So by his favour you became brothers. You were at the brink of a pit of fire, and he saved you therefrom. So God manifests for you his signs. Maybe you be guided! (89/3:103).

While admitting the possibility of having a secular society which does not need prophecy, with the exception of the Arabs, Ibn-Khaldun showed preference for a theocratic society. To this effect, he distinguished the organization of society in view of temporal success and the organization of society in view of the salvation of its members. Salvation, for him, could only be guaranteed by a theocratic society, which is governed by divine law. He wrote in this respect:

The purpose of human beings is not only their worldly welfare. This entire world is trifling and futile. It ends in death and annihilation... Anything (done by royal authority) that is dictated (merely) by considerations of policy or political decisions without supervision of the religious law is... reprehensible... The Lawgiver knows better than the mass itself what is good for them so far as the affairs of the other world... Political laws consider only worldly interests: "They know an appearance of the worldly life, whereas they are inattentive of the last [life]" (84/30:7). On the other hand, the intention of the Lawgiver concerning humankind is their welfare in the other world. Therefore, it is necessary, as required by the religious law, to cause the mass to act in accordance with the religious laws in all their affairs related both to this world and to the other world.²

In an encyclopaedia published by the Egyptian Ministry of *Waqf* it is written:

People with sound reasoning are unanimous about the fact that reason and human science cannot replace in any manner the guidance of the message through the medium of revelation, whatever the rational knowledge of the wise men and the thinkers. Their wisdom, their knowledge and their science are but insufficient human opinions and are mere speculations... and they are in any case prone to error and divergence, and their judgments are always relative. Who can arbitrate in case of divergences inherent to opinions ensuing from the rational effort? It is here that the necessity of revelation and prophetic clarification manifests itself to resolve the conflicts and the divergences, as proclaimed by God: "We did not descend the book on you except that you may make manifest to

¹ http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter2/Ch_2_26.htm.

² http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter3/Ch_3_23.htm.

them that wherein they diverged, guidance and mercy for a people who believe" (70/16:64).¹

This manner of thinking poses the basic problem of the origin of law; is it true that it comes from God? Is God not a mere pretext for those who want to attain power to impose their own will on people and on individuals, thereby depriving them of the liberty to manage their own lives? Such questions do not arise for a Muslim believer; because this would mean questioning the foundation of faith itself.

III. Amalgamation between law and religion

In what precedes, one notes an amalgamation between law and religion, already on the level of terminology.

1) Religion

The term religion (*din*), in Arabic as well as in other Semitic languages, signifies submission, last judgment, the debt, etc. Technically, jurists define it as: "The divine system which leads the one who follows it to rectitude and to virtue in this life and to salvation in the Hereafter."² Thus, religion includes not only cultural questions, but also legal questions.

2) *Shari'ah*

The term *Shari'ah* is used to designate Islamic law. Etymologically, it signifies the path to the watering place, an inexhaustible source of water. Still today, the term *shari'ah* is used to designate the street. It appears four times in the Koran under different forms to indicate decrees and legislations:

We descended to you the book with the truth, confirming what is before it of the book and predominant on it. Therefore judge between them by what God descended and do not follow their desires, far from the truth that came to you. To each of you we made legislation (*shir'ah*) and conduct (*minhaj*) (112/5:48).

He has legislated (*shara'a*) for you as the religion what he enjoined on Noah, [...] on Abraham, Moses and Jesus: "Establish the religion, and be not divided therein" (62/42:13).

Or do they have associates who have legislated (*shara'u*) for them the religion which God did not allow? If it was not a decisive word, it would have been decided among them. The oppressors will have a painful punishment (62/42:21).

We brought them proofs of the order. They diverged only after knowledge came to them, by abuse among themselves. Your Lord will decide between them on the day of resurrection in that wherein they were diverging. Then we put you on a path (*shar'*) of the order. Therefore, follow it and do not follow the desires of those who do not know (65/45:17-18).

Qasim, a contemporary Muslim author, defines *Shari'ah* as follows:

¹ *Al-Mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 16.

² Qasim: *Mabadi'*, p. 20.

The norms transmitted to Muhammad through revelation that improve human conditions in what concerns earthly life and the Hereafter, be they norms of dogmatic, cultural or ethical nature.¹

3) *Fiqh*

Etymologically, the term *fiqh* signifies comprehension, knowledge, etc. The Koran uses the derived forms of the word with this connotation twenty times.² For Muslim jurists, *fiqh* designates knowledge *par excellence*, a religious knowledge consisting of knowing the rights and the duties of man. In this respect, it is synonymous to *Shari'ah*. The first article of the *Majallah*, the Ottoman code, defines *fiqh* as follows: "*Ilm fiqh* is to know the practical propositions of the *Sher*" (*ma'rifa al-masa'il al-shar'iyyah al-'amaliyyah*). It adds: "The propositions of the practical part of the *Sher*' refer either to matters of the future life, and these are the provisions of the law which relate to the ceremonial aspect of religion (*'ibadat*), or they refer to matters of the present life, and these are divided into the following parts - marriage, dealings between people and their relations with and conduct towards one another (*mu'amalat*) and punishments."³

A religious scholar specialized in Islamic law is called a *faqih*. He deals not only with temporal aspects (such as sales contracts), but also with the religious aspects (how to perform prayer and pilgrimage). The Koran encourages people to get informed and to inform others about religious matters:

The believers do not have to mobilize all together. If only a number of every group of them mobilized in order to understand the religion and to warn their people when they return to them! Maybe they beware! (113/9:122).

As notated above, Islamic law does not entertain the concept of the sovereignty of the people. It has, for point of departure, sources independent of man and of his will: and these are the Koran and the *Sunnah*. Yet, the two sources are not systematic and structured legal texts and they do not cover all the aspects of religious and temporary human acts. The work of codification and the development of the norms contained in the two sources was the work of Muslim jurists during the first centuries of the Muslim era. Thus, jurists do not attribute themselves the role of legislation, but that of deducing laws from their sources.

Based on this historical fact, some contemporary Muslim authors endeavour to distinguish between *Shari'ah* and *fiqh*. For them, *Shari'ah* limits itself only to those norms that are proven by the Koran and the *Sunnah*, whereas *fiqh* concerns all the norms developed by jurists, basing themselves on the two sources. Some go even as far as excluding the *Sunnah* from the definition of the *Shari'ah*. The objective of the two trends of thought, to which we shall come back later in a more detailed manner,⁴ is to limit the scope of Islamic law and to attribute more liberty to man in the establishment of norms that govern him. However, proponents of these trends

¹ *Ibid.*, p. 22.

² 4:78; 6:25; 6:65; 6:98; 39/7:179; 8:65; 113/9:81; 113/9:87; 113/9:122; 113/9:127; 11:91; 50/17:44; 50/17:46; 18:57; 18:93; 20:28; 111/48:15; 101/59:13; 104/63:3; 104/63:7.

³ Originally translated into French by the author from the *Majallah*.

⁴ See Part IV, Chapter I.III.

are a minority and have been the object of criticisms and even anathemas of Muslim religious leaders. Some have even paid with their own lives for their audacity. We shall come back to these authors later.¹

4) *Shari'ah* and *Qanun*

Arabic language inherited the Greek term *Qanun* through Syriac language. It was often used by Ibn-Khaldun (d. 1406) to designate not only the norms of professions and sciences, but also the laws promulgated by the leaders, those vested with public power, in opposition to the *Shari'ah*. It is in this sense that the Ottoman Empire and other Muslim States, which succeeded it, employed the term to designate State laws, notably those inspired by Western laws. In order to distinguish it from the *Shari'ah* (the God-given law), it is called *Qanun wad'i* (positive law; made by the State). However, as the term *law* implies the existence of legislative power, and that the latter belongs, according to Islamic law, to God alone, Saudi Arabia substituted it with that of "regulation" (*nidham*).

Due to the existence of two juridical systems, Arab countries often have two distinct academic institutions: the faculty of law (*kulliyyat al-qanun* or *kulliyyat al-huquq*) and the faculty of *Shari'ah* (*kulliyyat al-shari'ah*), such as is the case in Damascus. The faculty of law prepares students to become lawyers and judges, whilst the faculty of *Shari'ah* prepares them for the function of judges in the domain of personal status and succession, both of which are disciplines of Islamic law, and as preachers and teachers of religion. However, the separation between the two faculties is not absolute. In fact, students of the faculty of law follow the basic courses of Islamic law and the students of *Shari'ah* also follow basic courses of positive law. As for the principles of law (*usul al-fiqh*), it is dispensed to both categories of students and the two faculties exchange professors. In Saudi Arabia, there are, on one hand, the faculties of *Shari'ah* (*kulliyyat al-shari'ah*) and, on the other hand, the faculties of "regulation" (*kulliyat al-andhimah*), that is the faculties that teach laws established by the State.

Al-Jalidi, a Muslim author, remarked the following differences between Islamic law and the positive law established by the State:

- Positive law is created and modified by the legislative power. Islamic law is divine in origin and can never be the object of further modification.
- The objective of positive law is to safeguard individual liberty and to protect society in view of its progress. Besides these objectives, Islamic law aims at assuring morality and the salvation of the soul.
- Positive law concerns external acts, prescribing temporal penalties in case of violation of laws. Islamic law is concerned with external acts as much as with the religious conscience, foreseeing, in addition to temporal penalties, religious penalties.
- Positive law is only concerned with relations between individuals and their relations with the State. Islamic law is furthermore concerned with the relationship

¹ See Part IV, Chapter I, point no. III.

between man and God, taking interest in his religious duties, such as prayer and pilgrimage.

- Positive law is generally a territorial law, applied to those residing in the country that established it and its validity lasting only for a determined duration. Islamic law applies to all the Muslims, at all times and in all places, whatever their place of residence; hence, the claims of the Muslims to have their norms enacted even in Western countries.
- Positive law is generally based on the coercive power of the State. Each time the people get the occasion to modify the law they can do so; if necessary by a revolution, in order that the law serves better their interests. Islamic law, on the contrary, is based on religious conviction and on submission to the will of God.¹

5) Amalgamation and individual liberty

One notes from the above differences that there exists in Islamic law an amalgamation between law, religion and morality. This amalgamation undermines individual liberty, as demonstrated by the following examples:

- In view of saving the soul, Islamic law has prescribed the death penalty against the religious apostate. In so doing, it has confiscated religious liberty and the right of the person to live according to his conscience and his intimate conviction. Positive law, on the contrary, acknowledges religious liberty and does not penalize apostasy.
- Out of the fear for the religion of the Muslim woman, Islamic law forbids her to marry a non-Muslim and yet allows a Muslim man to marry a non-Muslim woman. In so doing, Islamic law encroaches on personal liberty and discriminates Muslim women against non-Muslim men. Positive law, on the contrary, acknowledges the right to marry any person and rejects any religion based marriage impediment.
- Islamic law prescribes prayer and fasting during the month of Ramadan, and foresees penalties against the person who does not accomplish prayer and the one who breaks the fasting in public before the prescribed time. In so doing, the two religious practices have become a constraint instead of being the object of free religious conviction. Positive law, on the contrary, concedes every person the liberty to practice or not to practice religion.

Muslim authors are mute with regard to these objections because any criticism concerning Islamic law, considered the perfect law, puts into jeopardy the author of the criticism.

¹ Al-Jalidi: *Al-madkhal li-dirasat al-fiqh al-islami*, p. 40-44.

Chapter II.

The role of the State and legal schools

We have just seen that Muslims consider God to be the unique legislator and that people have no right to make laws. What then is the role of the State in this case? What is the genesis of Islamic law?

I. A State without legislative power

1) Separation between law and the State

Nowadays, the State has three prerogatives which are the expression of its sovereignty: legislative, judicial and executive. In principle, being of divine origin, Islamic law escapes State-controlled power.

Undoubtedly, the Muslim community became aware, from the very beginning, of the importance of having a unique codified text of the Koran. It continues to guard against any alteration of the original version of the Koran, by closely supervising the approval of new versions and banning any supposedly altered editions. However, this is how far the State could go. It has never pretended that the Koran was its creation, but rather considered it God's, personally.

The separation between law and the State is even more evident with regard to the *Sunnah*, the second source of Islamic law. The collections of the *Sunnah*, which comprise the sayings and acts of Muhammad, were entirely the work of individuals who were not mandated by State authority. For this reason, contrary to the Koran, these collections are multiple. The State had nothing to say in this domain, even though political considerations may have been at the origin of the fabrication of a certain number of narrations.

Basing themselves on the Koran and the *Sunnah*, Muslim jurists codified Islamic law. They were religious scholars who at times occupied the official judicial function (*qada'*), but who also worked somewhat independently of the State; the sources for their works being equally independent of the State. Progressively, schools of thought, called *madhhabs* (rites) or *madrasas* (schools), were formed around leading figures to which they owed their names. Coming from different geographical backgrounds, they arrived at diverging conclusions in their understanding of the Koranic norms and the hadiths, a divergence that was almost insignificant, in that they all strove to follow the same methodology offered by the science of *usul al-fiqh* (principles of jurisprudence) in the deduction of norms. They considered themselves as being at the service of the *Shari'ah*. Like the State, they did not arrogate to themselves the legislative power, which remained the exclusive prerogative of God. Thus, Ibn-Qayyim Al-Jawziyyah (d. 1351) titled one of his works *I'lam al-muwaqqi'in 'an Rab al-'alamin* (The instruction of the signatories for the Lord of the worlds).

2) Divisions within the Muslim *ummah*

After the death of Muhammad in 632, Muslims became divided over the issue of his succession. The Qurayshite faction, under the guidance of 'Umar (d. 644), imposed their candidate in the name of Abu-Bakr (d. 634), the father of the favourite

wife of Muhammad, Ayshah (d. 678), thereby side-lining 'Ali (d. 661) who was the cousin as well as the son-in-law of Muhammad; having married the latter's daughter, Fatimah (d. 632), born of his first wife Khadijah (d. 619). Abu-Bakr died a natural death in 634. 'Umar succeeded him and got assassinated in 644. 'Uthman, his successor, also got assassinated in 656. Named Caliph in the same year, 'Ali had to deal with wars which were triggered by his rival Mu'awiyah (d. 680), the governor of Syria and founder of the Umayyad dynasty. He ended up being assassinated in 661.

The partisans of Ali never ceased to believe that the procedure followed to elect the first successor of the Prophet at *Saqifah* was flawed and attempts at remedying the situation have been at the origin of bloody conflicts between the Sunnites (followers of the orthodox tradition of Muhammad) and the Shi'ites (partisans of 'Ali). Ambition and diversity in the lineage of the descendants of 'Ali led to the division of Shi'ites into a multitude of sects, said to be as many as 70; the historian Maqrizi (d. 1442) speaks of 300 sects mutually anathematizing one another.

The conflict between the Sunnites and the Shi'ites also provoked the emergence of a third group known as the Kharijites. They protested against the proposed arbitration aiming at bringing to an end the fight between 'Ali and Mu'awiyah and walked out of the meeting place (*kharaju*; hence Kharijites). They thus formed a new faction that was as much opposed to the Sunnites as to the Shi'ites. In turn, they further split into different factions, of which only the Ibadites have survived to date and they are in power in Oman.

In the subsequent paragraphs, we shall dwell on schools of jurisprudence that have ensued from the Sunnite, Shi'ite and Kharijite factions. We shall also say a word about schools that have disappeared.

II. Schools of Sunnite persuasion

The majority of the Muslims belong to one of the four Sunnite schools that bear the names of their founders. However, some tend to belong to more than one school concurrently; one dealing with juridical matters, adopted by the regime in place, and the other one dealing with aspects of cult and left to individual choice. Members of the same family can adhere to different schools.

1) The Hanafite School

The school carries the name of Abu-Hanifah (d. 767), a Muslim scholar of Persian origin. It saw its day in Kufa, in Iraq.

Abu-Hanifah, its founder, belonged to a well-to-do family from which he had inherited a flourishing silk business. He managed his enterprise by proxy and consecrated most of his time seeking knowledge from renowned scholars of his time. He then founded his own circle (*halaqah*) of student-disciples who benefited as much from his knowledge as from his wealth; since he also took care of all their material needs.

Abu-Hanifah had fixed ideas about the injustice of the leaders and declined every public function for fear of becoming incoherent with his own principles, an attitude that led to his persecution and death. He was known for his broad and open mind-

edness and used to avoid imposing his point of view on any one. One of the sayings attributed to him reads: "Such is our opinion; this is the best we have reached at so far; whoever has a better opinion, it will be considered the most correct." His reasoning was based on the Koran and the *Sunnah*, without hesitating in this regard to evoke divergent readings of the Koran. In the absence of a text based on the two sources, he would choose one opinion among the different opinions of the companions (*sahabah*). As for the opinion of the followers (*tabi'un*) of the companions, he considered them to be erroneous. Hence, he arrogated to himself the right to be able to reason in the same manner as they did, by having recourse to analogy (*qiyas*). He used to say: "They are men like us." Whenever he was not satisfied with the analogical procedure, he would opt for a solution that appeared more convenient (*istihsan*) for him. He would accept the recourse to consensus (*ijma'*) and to custom (*'urf*) only in the measure in which these did not contradict the Koran and the *Sunnah*.

His teachings comprised four characteristics:

- Being a trader, Abu-Hanifah deepened the understanding of commercial contracts, by subjecting them to the conditions of the awareness of the object of the contract for the interested parties, the prohibition of interest, the respect of established customs and trust.
- He favoured individual liberty, as long as the person had the capacity to reason, accepting the interference of the community or the authorities only when individual liberty contravened what was forbidden. Contrary to other jurists, including his own disciples, he accorded any adult reasonable woman the right to conclude the marriage contract by herself, even where this went against the will of the guardian. However, he requested that the husband fulfils the condition of suitability (*kafa'ah*; to be worthy of the family of the wife). He was opposed to the outlawing of a prodigal aged more than 25 years, unless he was of harm to others. He considered the individual liberty of a squanderer more important than the goods he may have squandered. He also preferred that the State intervenes as less as possible in people's personal relationships, allowing them to resolve issues among themselves. It was narrated that a man complained against a neighbour who had dug a cistern next to his wall, exposing it to the danger of collapsing. Abu-Hanifah advised him to discuss the issue with his neighbour and if the latter objected, to dig toilets near the cistern.
- Acknowledged as a man of great experience and perspicacity, Abu-Hanifah has been attributed a good number of juridical tricks which serve to soften the law. He was also known for his responses to hypothetical cases, trying to find solutions to problems even before they occurred through what was known as hypothetical law cases (*al-fiqh al-iftiradi*). Hanafite works are particularly rich with such cases.
- Abu-Hanifah was cautious in his use of the hadiths and accepted only those that were sound (*sahih*). For this reason, he often had recourse to analogical reasoning (*qiyas*). Some authors have explained the caution against the use of the hadiths as follows: the transmitters of the narrations resemble pharmacists who pre-

pare the medicine; as for the jurists, they resemble doctors who have to choose from among the medicines available the one that is the most suitable for the patient.¹

Abu-Hanifah did not leave behind any writings of his own, except for some minor pamphlets of theology and ethics. His disciples, notably the "two companions," diffused his juridical opinions:

- Abu-Yusuf (d. 798), the Grand Judge of Baghdad and the first man to occupy the function of *qadi al-qudat* (judge of judges). Only *Kitab al-kharaj* (the book of taxes) has remained of his writings.
- Al-Shaybani (d. 805), exercised judicial functions in Baghdad. His works constitute the primary source for the teachings of Abu-Hanifah. We mention some: *Al-mabsut*, *Al-ziyadat*, *Al-jami' al-kabir*, *Al-jami' al-saghir*, *Al-siyar al-kabir* and *Al-siyar al-saghir*. The last two are concerned with international relations and have rendered Al-Shaybani to be one of the pioneers of international law.²

The school of Abu-Hanifah was the official school of the Abbasid dynasty and the Ottoman Empire. It was propagated in the countries dominated by the two regimes, and even beyond their boundaries. Thus, the Hanafites are found in Iraq, in Syria, in Lebanon, in Jordan, in Palestine, in Egypt, in Turkey, in Albania, among the Muslims of the Balkan States and the Caucasus, in Afghanistan, in Bangladesh and among the Muslims of India and China. Rishi purports that half of all the Muslims are under the sway of the Hanafite School.³ In this respect, it is the majority school of jurisprudence among the Muslims. In some countries, in spite of being the official school on the juridical level, the Hanafite School faces competition from other schools on the popular level. Such is the case in Egypt where the majority of the population follows the Shafi'ite School and one can even find pockets of followers of the Malikite School.

2) The Malikite School

The school is known by the name of its founder Malik Ibn-Anas (d. 795). He was born of an Arab Yemenite family. He spent most of his childhood in the company of scholars of Medina studying hadiths and opinions (*ra'y*) of the companions (*sahabah*) and the followers (*tabi'un*). He then dedicated himself to teaching in the Mosque of the Prophet in Medina as well as in his own house. Unlike Abu-Hanifah who was rich, Malik would not disdain the gifts of the political leaders, assuming that it was their duty to support those who dedicated themselves to the teaching of others. On the other hand, he was reticent with regard to insurrections against the regime of the day, reckoning that disorder was more dreadful than an unjust regime and that every people got the kind of regime it deserved. For this reason, while preferring a government elected by the people, he was equally compliant to hereditary power in order to avoid unrest. When under an unjust regime, he strove to educate the people and to give good counsel to the regime itself whenever the oc-

¹ Rishi: *Al-madhhab al-hanafî*, p. 270-271.

² For major Hanafite works dealing with the principles and the branches of jurisprudence of law, see Rishi: *Al-madhhab al-hanafî*, p. 343-355.

³ Rishi: *Al-madhhab al-hanafî*, p. 341.

casion presented itself. In spite of that, he suffered persecution for uncertain reasons; probably due to his rejection of the pleasure marriage (*zawaj al-mut'ah*), his preference of 'Uthman (d. 656) to the partisans of 'Ali (d. 661) or because of a hadith he transmitted which said: "A constrained person is not bound by his oath of allegiance." The hadith was evoked by the partisans of 'Ali to justify their revolt against Caliph Al-Mansur (d. 775).

Malik dealt only with concrete questions and repelled the hypothetical ones. He would not hesitate to declare before his interlocutors "I do not know" and used to take his time before responding to questions, giving as much importance to the minor questions as to the major ones. He abstained from openly pronouncing himself on questions previously resolved by judges in order to preserve the prestige of their sentences and to stop people from disobeying them. He would nonetheless give advice to people.

The sources upon which Malik relied in formulating his opinions were the Koran, the *Sunnah*, practices of the people of Medina (*'urf*), opinions of the companions of Muhammad (*ra'y*), analogy (*qiyas*), public interest (*maslahah*), juristic preference (*istihsan*) and the closure of pretexts, notions to which we shall come back later.

The only authentic work attributed to Malik is *Al-muwatta'*. It is a casebook classified according to a juridical outline. For each subject, Malik evoked a hadith, an opinion of the companions, a practice of the people of Medina, opinions of the jurists and the solution proposed by him. Revised regularly at the beginning over a period of around forty years the work comprised 10,000 hadiths. The number was reviewed and reduced year after year. There are fourteen known versions of the work, three of which have been published: the one of Yahya Al-Laythi (comprising 1,843 hadiths), the one of Muhammad Al-Shaybani (comprising 1,008 hadiths) and the one of 'Ali Ibn-Ziyad (an unfinished edition).¹ Caliph Al-Mansur (d. 775) ordered it and wanted to impose it on all the regions in an attempt to unify juridical decisions, but Malik advised him not to do so because each region had its own sources for the *Sunnah* which it was following and which it believed in.² Another fundamental work for the Malikite School is *Al-mudawwanah al-kubra*, compiled by Sahnun (d. 855). It is comprised of Malik's answers in relation to 36,000 questions.³

The Malikite School is dominant in the following countries: Morocco, Algeria, Tunisia, Libya, Mauritania, Nigeria and other sub-Saharan countries. It has also a significant following in Egypt, in Sudan, in Bahrain, in Kuwait, in Qatar, in the United Arab Emirates and in Saudi Arabia. It is the second most important school in terms of the number of followers. It was also the school that was followed in Andalusia where some of the most renowned jurists included the judge of Cordoba Ibn-Rushd (d. 1126), author of *Al-muqaddimat al-mumahhidat*, and his grandson,

¹ Hamdan: *Al-muwatta'at*, p. 90-105. Concerning the manuscripts, see p. 106ff.

² *Ibid.*, p. 67-68.

³ For major Malikite works concerned with the principles of law and its branches, see Al-Jaza'iri: *Al-madhhab al-maliki*, p. 448-472.

the famous philosopher, Ibn-Rushd (d. 1198), known as Averroes in the West, author of *Bidayat al-mujtahid wa-nihayat al-muqtasid*.¹

3) The Shafi'ite School

The Shafi'ite School was founded by Muhammad Idris Al-Shafi'i (d. 820). He was born in Gaza and belonged to the Quraysh tribe, the tribe of the Prophet. After the death of his father, his mother, a Yemenite of origin, took him to Makka. He became a student of Malik (d. 795) in Medina for nine years. He was appointed as a public official in Nijran where he became a victim of persecution by the governor, under the pretext that he was a supporter of the faction of 'Ali and that he criticized the 'Abbasid regime. He survived the situation thanks to Al-Shaybani (d. 803) who was judge in Baghdad and of whom he was student for about two years before he went to teach in Makka. Later, he went to teach in Baghdad before relocating to Cairo where he eventually met with his final destiny in 820.

Al-Shafi'i had the merit of codifying the science of the principles of jurisprudence (*usul al-fiqh*) through his famous work *Al-risalah*. He recommended, like his two predecessors Abu-Hanifah (d. 767) and Malik (d. 795), the recourse to the Koran, the *Sunnah*, opinions of the companions (*ra'y*) and analogy (*qiyas*) but rejected juristic preference (*istihsan*) which consisted in establishing the most convenient norm where there was no explicit solution provided for in the aforementioned sources. He presumed that the one who had recourse to *istihsan* was acting as a legislator and was insinuating that Islamic law did not cover all aspects of life. Besides *Al-risalah*, Al-Shafi'i dictated two other works, *Kitab al-umm* and *Al-mabsut*, to his disciple Al-Za'farani (d. 875). During his stay in Cairo, he undertook the revision of his writings of Baghdad, adapting his doctrine to local customs, hence the distinction between the old and the new doctrine of Al-Shafi'i.

The following are some of the classic jurists of the Shafi'ite school:

- Al-Mawardi (d. 1058), author of two works *Al-hawi al-kabir* and *Al-ahkam al-sultaniyyah*.
- Al-Ghazali (d. 1111), author of *Ihya' 'ulum al-din*.
- Al-Nawawi (d. 1277), author of *Rawdat al-talibin* and *Al-majmu'*.²

The school has followers in Egypt, in Jordan, in Lebanon, in Syria, in Iraq, in Saudi Arabia, in Pakistan, in Bangladesh, in India, in Malaysia, in Indonesia and in some regions of Central Asia. In matters of worship, it has the largest number of Muslims in the world. This is explained by the family bond between Al-Shafi'i and Muhammad, his many journeys, his singular contribution to the development of the principles of law (*usul al-fiqh*) and his restrained predilection for the *Sunnah* without being too demanding.

4) The Hanbalite School

Reputed to be the most conservative of the Sunnite schools of jurisprudence, it owes its name to Ahmad Ibn-Hanbal (d. 855).

¹ Cf. the text in the bibliography (under Ibn-Rushd).

² For major Shafi'ite works concerned with the principles of law and its branches, see Al-Zuhayli: *Al-madhab al-shafi'i*, p. 536-541.

Ahmad was born in Baghdad from an Arab family. He was particularly interested in making a collection of hadiths, travelling extensively searching for them. He had been a student of Abu-Yusuf (d. 798), the disciple of Abu-Hanifah (d. 767) and Al-Shafi'i (d. 820) before recruiting his own disciples.

During the time of Ahmad, a Muslim religious inquisition known as *mihnah* took place. The Caliph Al-Ma'mun (d. 833), instigated by some Mu'tazilites, proclaimed, as official dogma, that the Koran was not eternal, but created. Whoever diverted from this dogmatic affirmation was to be stripped of his official public function, his testimony was no longer to be accepted in the tribunals and he was to be subjected to persecution. Ahmad suffered torture and was imprisoned for 28 months. He was released without having recanted. Later, he was forbidden to teach and to meet with people.

Ahmad led a modest life, avoiding controversy and abstaining from giving his opinion about hypothetical questions. He declined all public functions, believing that such functions, if exercised under an unjust regime, would imply complicity. He also refused any donations from the authorities and if ever he accepted any he would distribute them to the poor without taking anything back home. Although he was of the opinion that power was the preserve of the Qurayshite, the tribe of Muhammad, he accepted any Caliph chosen by the people, even a non-Arab. Furthermore, he considered that there was no need to revolt against a leader who had taken power by force but eventually ruled over the people with justice. He went as far as forbidding revolting against an unjust regime for fear of disorder and the weakening of the Muslim community. He always abstained from commenting on the disputes between 'Ali and Mu'awiyah which had divided the Muslim community. In so doing, he was observing a Koranic principle which states: "That is a nation that passed away. What it earned belongs to it, and what you earned belongs to you. You will not be asked about what they were doing" (87/2:134).

The major work written by Ahmad Ibn-Hanbal is *Al-musnad*, a collection of 28,199 hadiths, compiled by his son 'Abd-Allah and finalized by Abu-Bakr Al-Qati'i. Ahmad used to forbid his disciples from writing other than the hadiths of Muhammad, considering that his own opinions and those of the jurists were particular to their era, whereas the Koran and the *Sunnah* were divine orders valid for all times. In spite of that, his disciples used to write down also his opinions in their works. Although he seemed to attach importance only to the Koran and the *Sunnah* as sources of law, Abu-Zahrah (d. 1974) demonstrated that he also used to take into account other sources such as consensus (*ijma'*), which he limited only to the companions of Muhammad. He considered that whoever pretended that consensus was valid after the period of the disciples was lying. If an opinion were obvious, he would then prefer to say: "I do not know of a diverging opinion," without calling this consensus (*ijma'*). In addition, Ahmad used to have recourse to analogy (*qiyas*), unrestricted public interests (*masalih mursalah*), juristic preference (*istihsan*) and presumption of continuity (*istishab*); we shall come back to these notions later. However, Ahmad used to eschew having recourse to these sources where there existed a clear Koranic text, a *Sunnah* or a hadith of the companions.

Among the classic jurists of the school are to be mentioned notably:

- Ibn-Qudamah (d. 1223): author of *Al-'imdah*, *Al-kafi* and *Al-mughni*.
- Ibn-Taymiyyah (d. 1328): his principle writings have been collected together under *Majmu'at fatawa Ibn-Taymiyyah*.
- Ibn-Qayyim Al-Jawziyyah (d. 1351): author of a great number of works, among which is to be found, *I'lam al-muwaqqi'in 'an Rab al-'alamin*, *Zad al-mi'ad* and *Ahkam al-dhimmah*.¹

The Hanbalite School is not widespread; today it limits itself almost exclusively to Saudi Arabia where it is the official school of jurisprudence of the Wahhabis, currently in active collusion with the ruling Saudi family. There are four reasons for its limited influence:

- It was the last to be formed and it was implanted in a territory already occupied by the other schools.
- Contrary to the other schools, it had few jurists who were concerned with spreading the teachings of their master.
- It was not sustained by a political power that may have adopted its teaching. This happened only during the time of King Ibn-Sa'ud (d. 1953) who transformed the Hanbalite School into the official school of his Kingdom.
- Its adherents do not hesitate to clamp down on and to harass the public, in accordance with the Koranic principle "enjoin the good and forbid the evil," whenever they succeed in imposing themselves. According to the historian Ibn-Kathir (d. 1233), when the Hanbalites had a lot of power in Baghdad, in 934, they did not hesitate to spill out wine, flog the singers and smash their instruments. When they met a man strolling with women and children, they would question him over his marital status. If they did not get a satisfactory response, they would thrash him before taking him to the police. The practice is still in force today in Saudi Arabia where committees in charge of religious morality crisscross the markets and public routes, chastising those who do not respect religious norms concerning interaction between people of opposite sex, the dress code and prayers. Libraries as well as public and private institutions suspend their activities during the times of prayer.

III. Schools of Shi'ite persuasion

Shi'ites are divided into different groups, each one following its own school of jurisprudence. We will discuss only four of these schools: Ja'farite, Zaydite, Isma'ili and Druze.

1) The Ja'farite School

Most of the Shi'ites belong to the Imamate branch. They are also called the Twelvers, because they recognize a lineage of twelve *imams*, or Ja'farites, from their sixth *imam* Ja'far Al-Sadiq (d. 765). Several jurists benefited from Ja'far's

¹ For major Hanbalite works concerned with the principles of law and its branches, see Al-Hamawi: *Al-madhhab al-hanbali*, p. 613-618.

knowledge, among whom are to be mentioned Malik (d. 795), Abu-Hanifah (d. 767) and Al-Thawri (d. 778).

According to the imamate Shi'ites, the supreme authority of a Muslim State is the preserve of 'Ali (d. 661) and his direct descendants born of Fatimah, in line with the designation of Muhammad himself; a claim contested by the Sunnites. Shi'ites consider that the *imam* (a term used instead of Caliph) is endowed as much with infallibility as with impeccability, two qualities exclusively reserved to the prophets, according to the Sunnites. In support of their theory, the Shi'ites quote the following verse: "God wants to remove the abomination from you, people of the house [of the Prophet], and to purify you fully" (90/33:33). They add: "We made of them leaders who guide by our order when they endured and were convinced of our signs" (75/32:24). In addition, they quote Muhammad as having foretold a succession of twelve *imams* after him, all of them Qurayshite, his tribe.¹

Eleven of the twelve Shi'ite *imams* perished from violent deaths and the twelfth (Muhammad Al-'Askari, b. 873) is believed to have mysteriously gone into underground hiding (*sirdab*) in Samarra' (Iraq), while he was five years old, without leaving behind any progeny. His followers believe him to be in occultation (*ghaybah*) and they pray for the hastening of his *parousia* in order to accomplish the mission that the Islamic tradition has assigned to the *Mahdi* (the guided one): "to fill with justice the earth that has been pervaded by iniquity."² Article 5 of the Iranian Constitution mentions the return of the *Mahdi*:

During the occultation of the Wali al-'asr (may God hasten his reappearance), the leadership of the *Ummah* [Muslim community] devolve upon the just and pious person, who is fully aware of the circumstances of his age, courageous, resourceful, and possessed of administrative ability, will assume the responsibilities of this office in accordance with Article 107.³

Since the time of the occultation of the twelfth *imam*, the effort of the Shi'ites in juridical matters has been focused mainly on collecting the hadiths of their *imams*. Apart from their political concept, Shi'ites have the particularity of authorizing marriage of pleasure (*zawaj al-mut'ah*) and the prohibition of marriage between a Muslim and a non-Muslim woman in accordance with the following verse: "Do not hold to the ties of disbelieving women" (91/60:10). Sunnites reproached them also of having recourse to dissimulation (*taqiyyah*). We shall come back to this later.⁴

Contemporary Shi'ite literature affirms that the sources of Islamic law are the Koran, the *Sunnah*, consensus (*ijma'*) and reason (*'aql*). Consensus here means the accord over the sayings of the *imam*, which signifies that the recourse to consensus is in itself recourse to the *Sunnah* of the *imams*. As for reason, it signifies the link between a definite norm established by the religious law and another religious norm implied by the first one. For instance, the Koran and the *Sunnah* prescribe

¹ Salam: *Al-wihdah al-'aqa'idhiyyah*, p. 287-312.

² Concerning the occultation of the 12th *Imam* and his *parousia*, see Al-Nimr: *Al-shi'ah*, p. 189-235.

³ http://www.servat.unibe.ch/icl/ir00000_.html.

⁴ See Part III, chapter VI.III.

pilgrimage, but do not speak about the journey in the accomplishment of the pilgrimage. The obligation of the journey is deduced from the obligation to go on pilgrimage. In this case, it is not reason that creates the norm; it only establishes the relationship between the pilgrimage and the journey. 'Ali (d. 661) is quoted to have said in this regard: "God's religion is not conceived by reason." This means that reason cannot be a legislator.¹

Among the classic jurists of the Ja'farite School are to be cited in particular:

- Ja'far Ibn-Ya'qub Al-Kulayni (d. 939), author of *Al-kafi fi 'ilm al-din*.
- Abu-Ja'far Al-Tusi (d. 1067), author of *Tahdhib al-ahkam* and *Al-istibsar*.
- Ja'far Ibn-al-Hasan Al-Hilli (d. 1325), author of *Shara'i' al-islam*.
- Zayn-al-Din Al-Jaba'i Al-'Amili (d. 1559), author of *Al-rawdah al-bahiyyah sharh al-lam'ah al-dimashqiyyah*.²

The Ja'farite Shi'ites are an overwhelming majority in Iran. In every age, the sovereign of the country is strictly under the surveillance of religious leaders who are presumed to be the privileged interlocutors of the hidden *imam* (in occultation) and his lieutenants until the day of his return. Article 12 of the 1979 Iranian Constitution says:

The official religion of Iran is Islam and the Twelver Ja'fari school, and this principle will remain eternally immutable. Other Islamic schools are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.

These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school, without infringing upon the rights of the followers of other schools.³

The Ja'fari Shi'ites are also a majority in Iraq, and are found in different Gulf States, in Saudi Arabia, Syria, Lebanon, India and Pakistan.

2) The Zaydite School

It bears the name of Zayd Ibn-'Ali (d. 740), the fifth *imam* to claim power within the lineage of 'Ali, according to its followers. He was killed in a battle against the Caliph Hisham Ibn 'Abd-al-Malik (d. 743) who crucified him upon capturing him. Abu-Hanifah (d. 767) used to secretly support him and to issue *fatwas* in his favour. He was also his disciple for two years.

For Zayd, political power was not necessarily hereditary, even though it was preferable that it be the preserve of the lineage of 'Ali. Muhammad did not designate

¹ Al-Fadli: *Al-madhab al-imami*, p. 57-60.

² For major Shi'ite works concerned with the principles of law and its branches, see Al-Fadli: *Al-Madhab al-imami*, p. 155-179.

³ http://www.servat.unibe.ch/icl/ir00000_.html

the latter because of his name, but because of his quality of being the best among his companions. This rendered it possible to have a Head of State other than 'Ali or his lineage, if such was the wish of the Muslims. For the Zaydites, *imams* are not infallible. Apart from Muhammad, only four other people can be considered infallible: 'Ali (d. 661), Fatimah (d. 632) and their two sons Al-Hasan (d. 669) and Al-Husayn (d. 680). Zaydites do not admit the concept of the occultation of the *imam*. Consequently, they do not believe in the *parousia* of the *imam*.

Al-Fadli, a Shi'ite author, considers that, on the juridical level, the Zaydite School of jurisprudence is closer to Sunnism than to Shi'ism, whereas on the dogmatic level it is closer to Shi'ism than to Sunnism. He adds that the objective of its founders was to create a tendency that would reconcile Shi'ites and the Sunnites.¹

The Zaydite School of jurisprudence is the official school of Yemen. Among its jurists are to be cited in particular:

- Yahya Ibn-al-Husayn Ibn-al-Qasim (d. 911); he was the author of many works, among which *Al-qiyas* and *Kitab al-ahkam fi bayan al-halal wal-haram*.
- Ahmad Ibn-Yahya Ibn-al-Murtada (d. 1437); he was author of many works, among which *Matn al-azhar* and *Kitab al-bahr al-zakhkhar*.
- 'Abd-Allah Ibn Abu-al-Qasim Ibn-Miftah (d. 1472); he was the author of *Al-taj al-mudhahhab li-ahkam al-madhhab* which is the commentary of *Matn al-azhar*.
- Muhammad Al-Shawkani (d. 1834); he is considered to be one of the greatest jurists. His influence is not limited to the Zaydite School. Among his books are to be found *Nayl al-awtar* (an exegesis of the hadiths of Muhammad classified by legal order), *Irshad al-fuhul fi 'ilm al-usul* and *Al-durar al-bahiyyah*.

3) The Isma'ili School

Some Isma'ilis attribute their origin to Isma'il (Ishmael), the son of Abraham, or even to the beginning of creation. The faction in fact ensued from a schism within Shi'ism itself. Its claim was that after the demise of the sixth Shi'ite *imam*, Ja'far Al-Sadiq in 765, the imamate was passed on to his son Isma'il who was alleged to be dead solely in order to protect him from Sunnite persecutions. Shi'ite adversaries claimed on the contrary that he had indeed died in 764, outliving his own father. Thus, the imamate was to be transferred to his younger brother Musa Al-Qadhim (d. 799). After the death of Isma'il, the imamate was passed on to his son Muhammad (d. 812) who also led a hidden life, except in the eyes of his followers. The *imams* that succeeded him similarly led a hidden life until the emergence of the Imam 'Ubayd-Allah Al-Mahdi (d. 934), in the Maghreb, in 905. These *imams* claimed to be the descendants of Fatimah, the daughter of Muhammad and the spouse of 'Ali (d. 661). It is thus that they were called the Fatimides. Boosted by their legitimacy, they propagated their doctrine and surreptitiously created trouble. In 905, they created the first Fatimide State in Tunisia, they also enjoyed success in Yemen and Bahrain, and they reigned in Egypt from 909 to 1171. They founded the famous Azhar University in 970.

¹ Al-Fadli: *Al-madhhab al-imami*, p. 67.

Isma'ilis are known for their esoteric interpretation (*ta'wil*) of the Koran. Their ideology is close to neo-platonism. Apart from the Koran and the *Sunnah*, they give great importance to *Rasa'il ikhwan al-safa wa-khillan al-wafa* (Epistles of the brethren of purity and loyal friends).¹ This collective anonymous encyclopaedic work was a collection of 51 or 52 Epistles dating probably the end of the 10th century. Destined for study within closed circles, it represented the state of the Isma'ili doctrine at the time of its writing. It displayed great tolerance towards the different philosophical trends and religious communities whilst seeking to unify their thought.

Al-Qadi Al-Nu'man (d. 974) is considered to be authoritative in juridical matters. His work *Da'a'im al-Islam*, written towards the year 960, under the surveillance of Caliph Al-Mu'izz li-Din Allah (d. 975), the fourth Fatimid Caliph and 14th Isma'ili *imam*, was the official law of the State and has remained the major reference for tribunals in India and Pakistan in what concerns the personal status of the Isma'ilis. For them, the Koran and the *Sunnah* are the primary sources of law. Should the Muslims not find solutions therein, they must consult the *imam*, whose obedience is the first of the pillars of Islam (*arkan al-islam*), after faith in God. Prayer (*salat*) and good works (*'amal salih*) are futile without the *imam*, to whom they offer a fifth (*khums*) of their earnings to date.² Al-Qadi Al-Nu'man (d. 974) always made reference to the opinion of the Imam Ja'far Al-Sadiq (d 765). He used to reject independent thinking (*ijtihad*), analogy (*qiyas*) or consensus (*ijma'*) as sources of law.³

There exist today Isma'ilis of the East, found in Pakistan and in India where they are known as Bohra, with some followers located in Iran and Central Asia, and Isma'ilis of the West, found in the south of Arabia and in some Arab countries of the Gulf, in North Africa, in East Africa, in Syria, in Europe and America. They are attached to the current Imam Karim Agha Khan (b. 1936) who is the 49th *imam* within the lineage of 'Ali (d. 661) and his daughter Fatimah. He ascended to the throne the 11 July 1957. They are governed by a constitution,⁴ promulgated the 11 July 1990, which attributes to the *imam* the absolute power over religious and community affairs of the Isma'ilis (article 1). He can interpret, amend or repeal any law that concerns his community. The constitution has a provision both for a national and an international committee for reconciliation and arbitration aimed at resolving conflicts in civil, commercial and family matters (articles 12 and 13). For questions related to personal status (marriage, succession, apostasy), Isma'ilis are subjected to their own religious law. Nonetheless, should the country where they are found not recognize their law, it is the law of the land that is applied (article 15).

¹ *Rasa'il ikhwan al-safa*, vol. 2, p. 203-377.

² Concerning the importance of the Imam, see Al-Qadi Al-Nu'man: *Da'a'im al-islam*, vol. 1, p. 14-98.

³ On this particular point, see the work of Al-Qadi Al-Nu'man: *Ikhtilaf usul al-fiqh*.

⁴ Isma'ili Constitution: <http://www.ismaili.net/html/>.

It is worth noting that in Syria the Isma'ilis, like any other Muslim group, with the exception of the Druzes, are subjected to Islamic law and to a unified jurisdiction in matters of personal status and succession.

4) The Druze School

The Druzes, also known as *muwahhidun* (the unitarians) or *Banu Ma'ruf*, bear the name of Muhammad Ibn-Isma'il Al-Darazi (d. 1019/20)¹ who claimed to be God's incarnation during the time of the sixth Fatimid Caliph Al-Mansur Ibn-al-'Aziz bil-Lah (d. 1021), known as Al-Hakim bi-Amr Allah (ruler by Allah's command) who reigned from 996 to 1021. Whereas the Druzes paint an idyllic image of their divine Caliph, justifying his eccentricities,² their adversaries describe him as a man with uneven humour, debauched, tyrannical, bloodthirsty, one moment a persecutor, another moment generous towards non-Muslims. Towards the end of his life, he grew long hair and nails and he devoted himself to mysticism before finally disappearing. For some, he was assassinated during his retreat, under the conspiracy of his sister. For others, he became a Christian monk. As for the Druzes, they believe he ascended into heaven, whence he will come down on earth one day.³

Abu-Khzam, a Druze Shaykh who supports the Muslim identity of his community, affirmed that the sources for the Druze teachings and laws are the Koran, the *Sunnah* of Muhammad, the Old and the New Testament. Besides these sources, common to the Sunnite and the Shi'ite schools, the Druzes have their own sacred sources, namely *Rasa'il al-hikmah* (Epistles of wisdom, of which only 111 are known) and their exegetes, principally that of 'Abd-Allah Al-Tanukhi (d. 1479) who is considered to be the greatest Druze scholar.⁴

The Druzes have beliefs which largely diverge from those of the other Muslims. For instance, they believe in the incarnation (*tajalli*) of God into human form, 72 times over, in order to guide humanity. His last incarnation was the Caliph Al-Hakim bi-Amr Allah (d. 1021).⁵ They also believe in the repetitive re-incarnation of the individuals (*taqammus*) into other human bodies, under different names, with the number of people on earth remaining constant.⁶ Such was also the case with their five major prophets, the perfect beings who appeared simultaneously in

¹ Al-Darazi was assassinated in 1019 by Hamza, one of his companions, because of apostasy. As a result, the Druzes are embarrassed by this name which has remained attached to them.

² See Abu-'Iz-al-Din: *Al-Duruz fil-tarikh*, p. 95-110; Abu-Khzam: *Islam al-muwahhidin*, p. 34-48 and 55-59. For the justifications, see *Le Catéchisme des druzes*, questions 98-101.

³ Yassyn: *Al-'aqidah al-durziyyah*, 11-29; Yassyn: *Bayn al-'aql wal-nabi*, p. 36-78; Al-Khatib: *'Aqidat al-duruz*, p. 40-78.

⁴ Abu-Khzam: *Islam al-muwahhidin*, p. 63-108.

⁵ Abu-Turabi proves the possibility of the incarnation of God by quoting the following Koranic verses: 87/2:253; 4:164; 39/7:143 and 172; 63/43:84; 34/50:16; 10/89:22. He also quotes hadiths and some verses of the Old Testament (Abu-Turabi: *Man hum al-muwahhidun*, p. 18-20). Concerning God's incarnation, see Ibn-Sirin: *Masadir al-'aqidah al-durziyyah*, p. 65-114.

⁶ Abu-Turabi proves the possibility of individual reincarnation by quoting the following Koranic verses: 87/2:28; 4:51; 6:158; 51/10:4; 75/32:20; 60/40:11; 46/56:62 and 10/89:27-30 (Abu-Turabi: *Man hum al-muwahhidun*, p. 39-41). Concerning individual reincarnation, see Ibn-Khzam: *Islam al-muwahhidin*, p. 295-304; Ibn-Sirin: *Masadir al-'aqidah al-durziyyah*, p. 391-439.

every incarnation of God under different names. They are called *hudud* (bounds) by the Druzes, a term borrowed from the Koran but interpreted in their own way: "Those are God's bounds. Whoever obeys God and his messenger, he will enter him gardens underneath which the rivers run. They will be therein eternally. That is the great success!" (92/4:13).¹ At the end of times, God will re-appear again in the form of Al-Hakim, accompanied by his five prophets, to destroy the Ka'aba and the great Satan (Muhammad) and his wife ('Ali) [*sic*] before finally dominating the world.²

On the religious level, the Druze law nullifies the five pillars of Islam (*arkan al-islam*): the proclamation of faith (*shahadah*), prayer (*salat*), fasting (*sawm*), almsgiving (*zakat*) and pilgrimage (*hajj*), as well as holy war (*jihad*).³ It condemns apostasy and does not advocate proselytism, conversion to the Druze religion being excluded, in principle. It imposes dissimulation (*taqiyyah*) as much on the level of behaviour as on the level of the teachings of the Druze doctrine. We shall come back to this later.⁴

In Lebanon, Syria and Israel, the Druzes have their own laws and tribunals in matters of personal status. Their laws forbid mixed marriages and polygamy. Repudiation must be confirmed by the judge, who then obliges the man to pay the wife an allowance, had he repudiated her without any acceptable reason. It is considered definite and the husband can no longer take his wife back, contrary to the other Muslims. In Lebanon, Druze tribunals fill the gap of the law by having recourse to the teachings of the Hanafite School.

The Druzes count about a million followers shared as follows: Syria (500,000), Lebanon (300,000), Israel (98,000) and Jordan (20,000). Their number in the United States is estimated to be around 20,000.⁵

IV. Schools of the Kharijite faction: the Ibadite School

As a reminder, the Kharijites were those who refused to take sides in the conflict between Mu'awiyah (d. 680) and 'Ali (d. 661), following the famous arbitration of Aduh in 659 which brought to an end the fight between the two contenders of power. The Ibadites, whose name derives from 'Abd-Allah Ibn-Ibad (d. 705), are generally considered to be a moderate branch of the Kharijites. However, they deny such an identity, they condemn the exaggerations of the Kharijites, notably the branch that ensued from Nafi' Ibn-al-Azraq (d. 685), and attach themselves rather to Imam Jabir Ibn-Zayd (d. ca. 712) whose name they concealed in order to spare him persecutions. In this regard, the Ibadite School can be considered the oldest Muslim juridical school. In spite of that, Imam Malik (d. 795) held that the Ibadites, whom he considered to be part of the Kharijites, were supposed to be invited

¹ The term *hudud* appears 12 times in the Koran (87/2:187 and 229-230; 4:13; 113/9:112; 105/58:4 and 99/65:1). Muslim jurists understand the term in the sense of what belongs to God. It is often utilized to designate penal offences sanctioned by the Koran. For the Druzes, the term indicates people who are perfect.

² See Part III, chapter VI.III.

³ See *Rasa'il al-hikmah*, no 6, p. 49-63; Yassyn: *Bayn al-'aql wal-nabi*, p. 241-246.

⁴ See Part III, chapter VI.III.

⁵ The figures were taken from different websites.

to repent and, in case of refusal, to be killed. Today, Sunnites are more conciliatory in their regard and conjointly organize symposiums with them. One of their characteristics is the belief that the Koran was created and is not eternal, as is believed by the Sunnites, a doctrine that was at the origin of an inquisition known as *al-mihnah* during the time of the Abbassides.

Ibadites are a majority in Oman and are found in Yemen, Libya, Tunisia, Algeria and Zanzibar (considered a part of mainland Tanzania).

We should point out here that several juridical works of the Ibadite School were composed as poetry. Among their jurists can be cited in particular:

- Diya'-al-Din 'Abd-al-'Aziz (d. 1223): he was author of *Al-nil wa-shifa' al-'alil* which is the basis of the teaching of the school.
- Muhammad Ibn-Yusuf Itfish (d. 1914): he published the great exegesis of *Al-nil wa-shifa' al-'alil*.

V. Schools that have disappeared

In parallel to the above-mentioned schools, there were schools which enjoyed less success and ended up disappearing, without leaving behind any followers. We present here three of such schools, all of them Sunnite.

1) Al-Awza'i School

It bears the name of Imam 'Abd-al-Rahman Al-Awza'i. Born in Damascus where he served as *qadi*, he died in Beirut in 774. His teachings are known through the works of the other schools. For instance, they are found in Al-Shafi'i's work, *Siyar Al-Awza'i*, which contains the opinions of Abu-Hanifah (d. 767) about questions concerning war and peace treaties, with the responses of Al-Awza'i and the responses of Abu-Yusuf (d. 798). Al-Awza'i was the master of Malik (d. 795).

Disappeared in the 10th century, the school had been present in Andalusia, North Africa and Syria. It was in fact the dominant school in Syria before it was replaced by the Shafi'ite School during the 10th century.

2) The Dhahirite School

The school was founded by Da'ud Al-Asbahani (d. 883), well known for his ascetism, his humility and the courage to expose his opinions. He started by being a Shafi'ite before creating his own school. His deep knowledge of the hadiths of Muhammad earned some prestige for his school during a period that was dominated by diverging opinions of the jurists. During the 9th and the 10th century, his school was considered to be the fourth juridical school in the East, after those of Abu-Hanifah (d. 767), Malik (d. 795) and Al-Shafi'i (d. 820). The Hanbalite School later replaced it.

The school blossomed in Andalusia, thanks particularly to the writings of the famous jurist Ibn-Hazm (d. 1064) who was born in Cordoba from a well-to-do family of Persian origin. His father was a minister of the Caliph but got dismissed and suffered persecution. He entered into politics and even became a minister. He went through defeats, prison and exile but always turned back to religious sciences, not

without causing hatred for himself, to the point of having his books burnt. He started as a Malikite and then a Shafi'ite before finally becoming a Dhahirite.

The Dhahirite draw their name from the fact that, according to their jurists, the apparent meanings (*al-dhahir*) proceeding from the Koran and the *Sunnah* of Muhammad constitute juridical norms. They reject the recourse to other sources of Islamic law such as independent reasoning (*ijtihad*), for example. Recourse to independent reasoning implies putting into question the motives behind the norms (*maqasid*). Yet, God cannot be questioned: "He will not be questioned about what he does, but they will be questioned" (73/21:23). According to this school, when the Koran and the *Sunnah* are silent about an issue, the principle of legality should be applied in accordance with the verse: "It is he who created for you what is on the earth" (87/2:29). Commenting on the verse, "Satan caused them to slip from it, and brought them out wherefrom they had been. We said: 'Go down, as enemies to one another. You will have on the earth a settlement and an enjoyment for a while'" (87/2:36), Ibn-Hazm (d. 1064) wrote: "God has rendered licit for us everything by designating it as usufruct and he forbade what he wanted to forbid, all this through legislation." This means that whatever is not explicitly forbidden by the Koran and the *Sunnah* is considered licit. The concept leads to aberrant conclusions. For instance, should a dog drink from a bowl and leave some water, the water cannot be drunk or used for the ablutions, it being considered impure. In order to be purified, the bowl has to be washed seven times with clean soil, as prescribed by a hadith of Muhammad. If on the contrary it is a pig that drunk from the bowl, it is allowed to drink the rest and to use it for ablution since the hadith of Muhammad cited does not mention the pig.

Ibn-Hazm wrote a book entitled *Al-ihkam fi usul al-ahkam* in which he expounded the sources from which norms are derived. He is also the author of an important treatise of law entitled *Al-muhalla*.

The disappearance of this school is attributed to two factors:

- It had not taken into account the effort of independent reasoning (*ijtihad*) which allows for the adaptation of law to life situations.
- It did not have authors who could continue with the writing of works for the spread of its teachings.

3) The School of Al-Tabari

It was founded by Abu-Ja'far Muhammad Ibn-Jarir Al-Tabari (d. 923). He is notably the author of the world history: *Tarikh al-rusul wal-muluk*, and an important exegete of the Koran: *Jami' al-bayan fi tafsir al-Qur'an*. His juridical works disappeared, except for some parts of the work entitled *Ikhtilaf al-fuqaha'* (disagreements of the jurists). He was trained by the Shafi'ite and Malikite Schools.

VI. Convergences and divergences between the schools

As we have just seen, the Muslim world is divided into several juridical schools. There exist points of divergence between the schools, as well as between the jurists of the same school. However, we can say that the points of convergence are much

more significant than the points of divergence. The divergences are attributed to three principle reasons:

- 1) Jurists disagree with regard to the sources from which religious norms are to be deduced. If all agree in saying that the Koran was the first source of law, they agree less about the *Sunnah* of Muhammad. Ibn-Khaldun (d. 1406) wrote in this regard:

It should also be known that religious leaders of independent judgment differed in the extent of their knowledge of traditions. It is said that the (number of) traditions that Abu Hanifah transmitted came to only seventeen or so. Malik accepted as sound only the traditions found in the *Muwatta'*. They are at most three hundred or so. Ahmad Ibn-Hanbal has 50,000 traditions in his *Musnad*.¹ Each (authority) has as many traditions as his independent judgment in this respect allowed him to have.²

The difference in attitude with regard to the hadiths does not signify the refusal to conform to the norms enounced by Muhammad, but rather distrust with regard to hadiths whose authenticity were doubtful. Muhammad used to say in this regard that he who transmitted a false hadith in his name would go to hell. Because of this, jurists who were suspicious with regard to such hadiths used to resort, as a matter of preference, to reasoning by analogy (*qiyas*) and other rational sources which we shall discuss in the subsequent chapters in order to find solutions to the arising questions. On the contrary, the jurists who believed in the hadiths believed less in analogy (*qiyas*) and other rational sources. It is important to add here that the most significant collections of the hadiths of Muhammad were composed only after the emergence of the schools and, by consequence, it was not easy to have access to the hadiths before then. On the other hand, schools of jurisprudence had their collections of preference and did not recognize the collections of others. We shall come back to this question when we shall speak about the *Sunnah*.

- 2) Jurists disagreed with regard to Koranic verses, the abrogating and the abrogated hadiths, the comprehension of the language of the Koran and the *Sunnah* and the classification of human acts into the following ethical categories: obligatory (*wajib*), recommended (*mandub*), distasteful (*makruh*), permissible (*mubah*) or forbidden (*haram*).
- 3) Soon, the Muslim community was besieged by schisms and divisions, accompanied by anathemas and wars. Each group therefore tried to interpret the Koran in its own manner and did not hesitate to invent hadiths in support of its attitude towards its adversaries. Although political authorities tolerated the co-existence of the different schools, they at times favoured one school rather than the other, by appointing judges belonging to such a school. This exacerbated the tensions and the doctrinal divergences, to which were to be added philosophical divergences.

¹ According to the edition at our disposal the collection has 28,199 hadiths.

² http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter6/Ch_6_11.htm

Treatises of Islamic law not only generally dealt with the different solutions provided by schools of jurisprudence, but also opted for the solution offered by the school to which the author of the treatise belonged. The approach was raised to the status of a science known as *'ilm al-khilafat* (the science of divergences) to which not less than 150 monographs were consecrated, some of which are still in the state of manuscripts.¹ Initially, the relationship between the different schools was marked by great tolerance and mutual respect, in accordance with a hadith of Muhammad which said: "Difference of opinion in my Community is a mercy." Leaders of these schools were acquainted with one another and some of them had a master-disciple relationship or were co-disciples. They held each other in mutual esteem in spite of their divergences in opinion.² The different points of view were accepted as long as the following essential elements of religion were not put into question:

- The five pillars of Islam (*arqan al-islam*), i.e., professing that there is no divinity but Allah and Muhammad is his messenger (*shahadah*), prayer (*salah*), alms-giving (*zakat*), fasting during the month of Ramadan (*sawm*) and pilgrimage (*hajj*).
- The six articles of the Islamic faith (*'aqidah*), i.e., belief in God (*iman*), his angels (*mala'ikah*), his books (*kutub*), his apostles (*rusul*), the Last Day (*al-yawm al-akhir*) and destiny (*qadar*).
- The acceptance of the Koran and every hadith whose authenticity and meaning are incontrovertible.
- The questions over which there was unanimity and which figured in the works dedicated to the subject.³

All the other questions resolved by the texts whose meaning was not peremptorily clear, could be the object of divergences on condition that they presented arguments in favour of the solution adopted. In such questions, the solution could not be imposed by constraint. That is why Malik (d. 795) refused that his *Al-Muwatta'* be imposed on all the Muslims, as requested by the Caliph Al-Mansur (d. 775). Similarly, the leaders used to ask their students not to blindly imitate them (*taqlid*), but to refer themselves to the two sources of Islamic law: the Koran and the *Sunnah*. For instance, Abu-Hanifah (d. 767) forbade those who ignored his arguments to render religious decisions based on his sayings. He would conclude his opinions saying: "Such is our opinion; this is the best we have reached at so far; whoever has a better opinion, it will be considered the most correct." Al-Shafi'i (d. 820) used to say: "If the hadith I cite is authentic, it is my doctrine, and if you note that I have contradicted the hadith, follow the latter and discard my words."⁴

However, tolerance was not observed by all and at all times. The tone of some jurists against adversary schools became more and more polemical. Some even

¹ See the titles in Al-Masri: *Ma'rifat 'ilm al-khilaf*, p. 122-160.

² Concerning mutual respect between the companions and the first jurists, see Al-'Alawani: *Adab al-ikhtilaf fil-islam*, p. 48-74 and 115-134.

³ Al-Masri: *Ma'rifat 'ilm al-khilaf*, p. 62-66.

⁴ *Ibid.*, p. 66-72.

prescribed cutting the finger of the person who raised it contrarily to what was prescribed by Imam Hanifah. The followers of one school would refuse to pray together with followers of the other schools, including inside the mosque of Makka. Some Hanafites would even claim that Jesus would rule over the Muslims after his second coming according to the teaching of their school.¹

Although the division of the Muslim community into schools of jurisprudence subsists, modern Muslim jurists have adopted a more conciliatory tone towards one another. They do not deny the divergences in opinion, rather they prefer employing the term "comparative law" (*al-fiqh al-muqaran*, or *al-fiqh al-muwazan*) in their writings, the objective being that of making known the points of view of everyone and the reasons of the divergences in opinion, to eliminate the frictions that could exist between them due to mutual ignorance and to rally everyone around a common solution.² Some overtly advocate for the unification of the schools, as will be explained in the following point.

VII. Attempts at the unification of schools

1) Past attempts

The will to unify the schools is old and has taken several forms. We have already pointed out that Caliph Al-Mansur (d. 775) wanted to impose on his subjects *Al-muwatta'*, the work written by Malik (d. 795), but the latter advised against the idea. The Caliph then got inspired by a letter addressed to him by Ibn-al-Muqaffa' (d. 756):

One of the questions which must retain the attention of the Commander of the believers (*Amir al-mu'minin*)... is the lack of uniformity, the contradiction that becomes manifest through the pronounced rulings; the divergences present a serious degree of gravity... At Al-Hira, death penalties and sexual offences are considered licit, whereas they are illicit in Kufa; one notes a similar divergence in Kufa itself, where what is deemed illicit in one quarter is considered licit in another... If the Commander of the believers found it opportune to issue orders so that such sentences and their diverging juridical practices would be presented to him in form of a report, accompanied by analogical traditions and solutions to which each school should refer; if the Commander of the believers could then examine the documents and formulate the opinion which God would inspire him over each matter, if he firmly believed in the opinion and forbade the *qadis* to stray away from it, if he, finally, compiled the decisions into an exhaustive corpus, we could hope that God will transform the judgments in which error is enmeshed with truth into a unique and just code.³

The wish did not become a reality.

2) Attempts at unifying the teachings of individual schools

Every school of jurisprudence bears some divergence of opinion among its jurists. The first approach to achieving juridical unity is the agreeing together among the

¹ *Ibid.*, p. 72-77.

² Al-Hakim: *Al-usul*, p. 9-11.

³ Pellat: *Ibn-al-Muqaffa'*, p. 40-44.

individual schools themselves about the opinion to uphold. It was thus that Sultan Muhammad Alimkir (d. 1707) created a commission that was to be responsible for establishing a compendium of the dominant Hanafite opinions in order to facilitate the work of the judges and the *muftis*. The compendium, entitled *Al-fatawa al-hindiyyah*, was written between 1664 and 1672.¹ However, in spite of having received official backing, it had no binding force.

In the Ottoman Empire, Sultan Salim I (1512-1520) declared the Hanafite School the official school of the Ottoman Empire in what concerned juridical questions, with the exclusion of matters of worship. It was not until the 19th century that the first Ottoman attempt at codification was realized and, by consequence, the unification of the norms of all the schools in form of the famous code known as *Majallat al-ahkam al-'adliyyah*, comprising 1851 articles, elaborated between 1869 and 1876. The code dealt with the law of obligations, real laws and judicial law. It omitted laws related to personal status which were codified only in 1917.

In Egypt, it is worth noting the work of Muhammad Qadri Pacha (d. 1888) who compiled the teachings of the Hanafite School in three domains:

- *Al-ahkam al-shar'iyyah fil-ahwal al-shakhsiyyah*,² published in 1875, dealing with family and succession law in 647 articles (according to the Cairo edition of 1900). It was the first attempt by a Muslim jurist to codify this domain of Islamic law. This code is often used by Egyptian, Syrian, Jordanian tribunals, as well as by other tribunals to fill the gap. It was translated into French for use in mixed tribunals under the title: *Code du statut personnel et des successions d'après le rite hanafite* (the code of personal status and succession according to the Hanafite School).
- *Murshid al-hayran ila ma'rifat ahwal al-insan*,³ dealing with real estates and contracts in 1,049 articles (according to the 1933 edition). It was edited by the Ministry of Education and meant to be taught in government schools.
- *Al-'adl wal-insaf fi mushkilat al-awqaf*, dealing with religious welfare.

Saudi Arabia, one of the countries without a civil code, has a private compilation of the teachings of the Hanbalite School, its official school. The compilation, entitled *Majallat al-ahkam al-shar'iyyah*, deals with the law of contracts and judicial law in 2,382 articles. It was the work of the former president of the Supreme Muslim Court of Makka, the Shaykh Ahmad Al-Qari (d. 1940). It was utilized in its manuscript state by Saudi tribunals, before finally being published in 1981.⁴

3) Attempts at syncretism in the context of States

The unification attempts mentioned in the previous point are limited to the teachings of individual schools. However, there have been State led initiatives to go beyond this situation by accepting norms from different schools whilst giving precedence to one of them. This was already the case under the Ottoman Empire for

¹ See the text in <http://feqh.al-islam.com/Bookhier.asp?Mode=0&DocID=73&MaksamID=1>.

² Qadri Pacha: *Al-ahkam al-shar'iyyah*.

³ Qadri Pacha: *Murshid al-hayran*.

⁴ Al-Qari: *Majallat al-ahkam*.

which the family code of 1917 was limited to the teachings of the Hanafite School. Here are some examples, starting with Egypt:

During the dynasty of Muhammad 'Ali (d. 1849) which depended on the Ottoman Empire, judges had to exclusively follow the Hanafite School, although the majority of its inhabitants followed the Shafi'ite School. We have already pointed out the code of Qadri Pacha (d. 1888) which was a compilation of the teachings of the Hanafite School in matters of personal status and succession. However, in 1915 a commission drafted a family code inspired by the four Sunnite Schools. The swirl of opposition caused by the project ended up carrying the day. Part of the project was, however, adopted by law 25 of 1920 which was principally inspired by the Malikite School. Another commission was formed in 1926 whose majority members were students of the reformist Imam Muhammad Abduh (d. 1905). This resulted in law 25 of 1929 which was inspired by the four Sunnite schools. This was followed by law 77 of 1943, dealing with succession, and law 71 of 1946, dealing with testaments. Article 37 of the previous law was borrowed from the Shi'ite School; it allowed the heir to be a legatee within the limits of a third of the goods left behind by the deceased, without the consent of the other heirs, in contrast to the teachings of the Hanafite School. However, these laws did not cover all the matters related to personal status. Following the unification of Egypt and Syria (1958-1961), it was decided to launch a project for a family code covering the whole of family law, based on the Ottoman family code, the above mentioned Egyptian laws, Qadri Pacha's code of personal status and succession, Syrian code of personal status, the teachings of the four Sunnite schools and other schools. Article 409, however, refers back to the most authoritative opinions of the school of Abu-Hanifah (d. 767), in case of any lacunae.¹ The project was never realized.

The overstepping of the bounds among juridical schools in Egypt is most evident in the Egyptian civil code whose first article stipulates in paragraph two: "In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of [Islamic] Law. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity." Furthermore, article 2 of the Egyptian Constitution stipulates that "Islamic jurisprudence is the principal source of legislation." No restrictions were imposed with regard to the school which was to inspire the judge or the Egyptian legislators. Nonetheless, article 280 of the government decree 78/1931, whose content was repeated in article 3 of law 1/2000, refers back to the most authoritative opinions of Abu-Hanifah, in case of any lacunae.

In 1953, Libya, the majority of whose population follow the Malikite School, adopted a civil code inspired by that of Egypt. Paragraph 2 of the first article of the code stipulated: "In the absence of a provision of a law that is applicable, the Judge will decide according to the principles of [Islamic] Law, and in their absence in accordance with custom. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity." No school was given prece-

¹ See the text with its explanatory memory in *Mashru' qanun al-ahwal al-shakhsiyyah al-muwahhad*.

dence over the others. Libya adopted four laws governing offences foreseen by Islamic law, namely: theft and robbery (*sariqah*: law 148 of 1972); adultery (*zina*: law 70 of 1973); false accusation of adultery (*qadhif*: law 52 of 1974) and consumption of alcohol (*shurb al-khamr*: law 89 of 1974). The last three laws refer back to the least severe school, in case of any lacunae, and to the criminal code, for want of norms among the consulted schools. The first law, on the contrary, refers back to the most notable opinion of the Malikite School. However, the law was modified by law 8 of 1975 in line with the other three laws.

In the United Arab Emirates, the people follow both the Malikite School and the Hanbalite School. The first paragraph of the first article of the civil code of 1985 says:

In the absence of a provision of a law that is applicable, the Judge will decide according the principles of [Islamic] Law, *giving precedence* to the most convenient solutions of the schools of Imam Malik and Imam Ahmad Ibn-Hanbal and in the absence of such solutions, to those of the schools of Imam Al-Shafi'i and Imam Abu-Hanifah.

The unification of the schools was reached at in an indirect manner through the acceptance of the Egyptian civil code in many Arab countries which often had recourse to the services of its author Al-Sanhuri (d. 1971).¹ For these countries, the acceptance was meant to facilitate the unification of the Arab law one day. Thus, the memorandum of the Syrian civil code reads: "The reception of the Egyptian Civil code performs one of the noblest goals that seek to achieve the Arabs in this time, namely the unification of the legislation in the Arab countries." The memorandum of the Iraqi civil code insists on this idea and speaks of an eventual unified Arab civil code. Clearly, the Egyptian code was largely inspired by the Western law. However, it contains a certain number of norms which have been derived from Islamic law. The codification of the norms implies choosing from among the solutions foreseen by the different schools.

4) Attempt at syncretism in the supranational context

The attempt to go beyond diversity in schools of jurisprudence is manifest in the projects prepared by the Arab League and the Gulf States Cooperation Council (GSCC). We shall come back to this later.²

In the same vein, it is necessary to point out academies of Islamic law which assemble Muslim jurists from different countries belonging to different schools to debate juridical problems faced by Muslims in the field of economy (banks, insurances, lease contracts, etc.), bioethics (abortion, in vitro fertilization, euthanasia, etc.), or even questions of international politics (the peace treaty between Israel and Egypt, the invasion of Kuwait by Iraq, the participation of Muslims in the libera-

¹ The Egyptian civil code served as a model for different Arab civil codes. Such was the case for the civil codes of Syria, Libya, Iraq, Jordan, Sudan, Algeria, Kuwait, Somalia, Qatar, United Arab Emirates and Yemen. It has also been the basis for the unified civil code project prepared by the League of Arab States and that of the Gulf Cooperation Council (GCC).

² See Part IV, chapter I.II.4.

tion of Kuwait alongside Western forces, the occupation of Iraq by the United States and its allies, etc.). Among these, it is worth noting in particular:

- The Islamic Fiqh Council (*Majma' al-fiqh al-islami*)¹ which depends on the Muslim World League (*Rabitat al-'alam al-islami*), whose Headquarters are in Makka.
- The International Islamic Fiqh Academy (*Majma' al-fiqh al-islami*) which depends on the Organization of the Islamic Cooperation (O.I.C.), whose Headquarters are in Jeddah.²

There are also some organizations in the West which endeavour to keep the Muslims in Western countries well informed in matters of Islamic law. Of these it is worth mentioning the following:

- The European Council for *Fatwa* and Research (*Al-markaz al-'urupi lil-ifta' wal-buhuth*), founded in London in 1997.³
- Assembly of Muslim Jurists in America (*Majma' fuqaha' al-shari'ah bi-Amrika*).⁴

We can also mention some attempts at *rapprochement* (*al-taqrib*) between the Sunnites and the Shi'ites. It was thus that, under the initiative of Shaykh Muhammad Taqi Al-Qummi, *Dar al-taqrib bayn al-madhahib al-islamiyyah* (The House of *rapprochement* between Islamic schools of jurisprudence) was created in Cairo, in 1947. Many Sunni Shaykhs supported it, among whom the then Shaykh of Al-Azhar Mahmud Shaltut (d. 1963) and Hasan Al-Banna (d. 1949), the founder of the Muslim Brothers. The institution published a periodical entitled *Al-risalah* whose issue 60 of 1972 was the last to be published. It ceased its activities in 1979. The initiative of *rapprochement* is pursued today by *Al-majma' al-'alami lil-taqrib bayn al-madhahib al-islamiyyah* (The World Society for the *rapprochement* of Islamic schools of jurisprudence) whose Headquarters are in Tehran.⁵ The general attitude between the Sunnites and the Shi'ites remains that of mutual exclusion. A number of classic⁶ and contemporary⁷ *Sunni* authors refuse to recognize Shi'ites as Muslims and go as far as accusing them of dissimulating their love for the family of Muhammad in order to destroy Islam. They presume that Shi'ism is a form of Persians political resistance, supported by the Jews, in order to revenge against the Arabs who had invaded their land and destroyed their kingdom.⁸ They characterize the *rapprochement* between the Sunnites and the Shi'ites, an initiative promoted almost entirely by the latter, a "*rapprochement* of complacency,"⁹ or as a means of infiltration and dissimulation.¹⁰

¹ See its decisions in Arabic language in <http://www.muslimworldleague.org/>.

² <http://www.fiqhacademy.org.sa/>.

³ <http://www.ecfr.org/>.

⁴ <http://amjaonline.org/arabic/index.asp>.

⁵ <http://www.taghrib.org/>.

⁶ See in particular Ibn-Taymiyyah: *Minhaj al-sunnah*; Al-Ghazali: *Fadai'ih al-batiniyyah*.

⁷ See for instance Frayj: *Al-shi'ah*; Al-Bandari: *Al-tashayyu'*.

⁸ The idea has been developed by Al-Nimr: *Al-shi'ah*, particularly p. 54-81.

⁹ Al-Nimr: *Al-shi'ah*, p. 172-176.

¹⁰ <http://www.saaidd.net/Minute/25.htm>.

5) The scope of the unification

The unification sought by the Muslims covers all the branches of law (*furu' al-fiqh*) as well as the principles of law (*usul al-fiqh*). On this level, we can underline the work of the Egyptian professor Muhammad Zaki Abd-al-Birr: *Taqnin usul al-fiqh*, published in 1989, which contained 188 articles, with explanatory notes for each article. He presented his work as part of a program for the return of the Muslims to Islamic law instead of the law inherited from Western countries.

Unification was not limited to legislation. In fact, it also covered the *fatwa*, as we saw with the International Islamic Fiqh Academy.

Furthermore, it was also concerned with the unification of the tribunals. In Arab countries, there was a tribunal for each school, with judges applying norms of their particular school. However, the dichotomy within the Muslim community gradually disappeared. Some vestiges nonetheless continue to subsist. For instance, in Bahrain there exist Ja'farite tribunals and Sunnite tribunals, each one applying the norms of its respective school, although still uncoded. In Lebanon, the Shi'ites, the Sunnites and the Druzes have their own respective tribunals which apply norms that are equally uncoded. A Lebanese Muslim once asked for the suppression of such tribunals and the creation of unified Muslim ones.¹ In Syria, Shi'ites and Sunnites are subjected to a unified Muslim tribunal which applies a unified code of Muslim personal status. The same applies for the Druzes, with the exception of some norms mentioned in article 307 of the personal status. Nonetheless, the Druzes of the district of Suwayda' have their own religious tribunals.

VIII. Dependence or autonomy of Islamic law

One of the debates that stirs up Western historians of law is that of knowing how far Islamic law has been influenced by existing foreign laws, among which the Roman law.² Muslim authors have rejected this hypothesis. For them, "the sources of Islamic law are independent and derive solely from the divine will."³

Acknowledging external influence on Islamic law would be problematic for Muslim jurists because that would undermine the Muslim concept according to which law is of divine origin. On the other hand, many hadiths of Muhammad asked Muslims not to resemble other people. For instance, there is a hadith of Muhammad which says: "He who resembles a group he is part of it."⁴ In the same vein, the following two Koranic verses are also cited:

This is my straight path. Follow it, and do not follow the ways that separate you from his way (55/6:153).

Do not be as those who forgot God, and he caused them to forget themselves. Those are the perverse (101/59:19).

¹ Suwayd: *Al-Madhahib al-islamiyyah*, p. 306-308.

² See the collection of articles on the subject: *Hal lil-qanun al-rumi ta'thir 'ala al-fiqh al-islami?* and Imam: *Nadhariyyat al-fiqh*, p. 91-100.

³ Al-Zuhayli: *Usul*, vol. II, p. 927.

⁴ Ahmad, hadith 5114.

Some classic jurists go as far as calling for the death penalty against those who resemble the disbelievers and refuse to recant.¹ The prohibition to resemble others is evoked today by those who want to reject modern Western remnants of laws and morals in Islamic law.

There is need, however, to take into account the fact that the Koran and the *Sunnah*, the two primary sources of Islamic law, were greatly inspired by the Old Testament, as can be easily noted, for example, in matters of penal law² and food prohibitions.³ Moreover, the Koran orders Muhammad to follow, in case of necessity, the norms revealed to the prophets who preceded him.⁴ Collections of hadiths narrate that Muhammad willingly conformed to the norms of the People of the Book (*ahl al-kitab*) in the domains in which he had not yet received the revelation. Islamic law also comprises customs of the pre-Islamic era (*'urf*). Muhammad said in this regard that it was necessary to conform to what was righteous from that era. For instance, the practice of pilgrimage, one of the five pillars of Islam, was borrowed from Arab polytheists. The different groups that had converted to Islam indubitably brought with them their own customs. In fact, those who converted were supposed to emigrate from their respective lands to join Muhammad. Thus, Medina experienced the influx of Yemenites, people from the north of Arabia, Ethiopians, Iranians and Byzantines. Through this interaction, Islamic influence spread over countries in three continents, whose people spoke at least twelve different languages. Among the outstanding Muslim jurists, are to be found a good number of non-Arabs, such as Abu-Hanifah (d. 767), the founder of the Hanafite School, who was of Iranian origin.⁵ It is important, however, to point out that, in contrast to the other sciences, Greek and Roman juridical works have not been the object of Arabic translation, and there are no terms of Greek or Latin origin in Islamic law, in contrast to what can be noted in philosophy and in other fields of knowledge.

Whatever the case, concerning the origin of Islamic law, Muslim jurists have succeeded, in less than a century and half, through a method of deduction and basing themselves on the Koran and the *Sunnah*, to create a complete juridical system, governing both spiritual and temporal matters, with more or less significant divergences due to religious and political tendencies which had divided the Muslim community.

¹ Al-Luwayhiq, p. 126-127.

² For the difference between biblical and Koranic sanctions, see Tyan: *Le système de responsabilité délictuelle en droit musulman*.

³ For the difference between food taboos in the Koran and in the Bible, see Aldeeb Abu-Sahlieh: *Les interdits alimentaires*.

⁴ 6:90; 70/16:123; 91/60:4; 87/2:4-5.

⁵ *Hal lil-qanun al-rumi ta'thir 'ala al-fiqh al-islami?* p. 27-32.

Chapter III.

Maintaining laws of other communities

I. People of the Book (*ahl al-kitab*)

1) Toleration of monotheistic communities

In some Muslim countries, such as Jordan, Lebanon, Syria and Iraq, non-Muslim communities still have their own tribunals and their own laws in what concerns personal status. In Egypt, communal tribunals were unified, but the laws were maintained. The system which prevailed over the Ottoman Empire and the other Islamic regimes that preceded it had its source in the Koran.

The Koran starts with the idea that people were originally one community to which God sent prophets to guide them in virtue of divine laws inscribed in the book. However, the people went astray:

The humans were only one nation. Then they diverged. If not for a word that proceeded from your Lord, it would have been decided between them in that wherein they are diverging (51/10:19; see also 87/2:113).

Muhammad considered himself as the last and the seal of prophecy (Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets - 90/33:40). He attempted to rally other communities to his cause in order to unify them, but all in vain. Each community remained attached to its norms and each of them endeavoured to attract the others:

Neither the Jews, nor the Nazarenes will be pleased with you until you follow their religion. Say: "God's guidance is the guidance." If you followed their desires after the knowledge which came to you, you will have against God neither an ally, nor a succourer (87/2:120).

Even though you brought every sign to those who were given the book, they would not follow your direction [of prayer], nor will you follow their direction [of prayer], nor will they follow each other's direction [of prayer]. If you followed their desires after the knowledge which came to you, you would have been of the oppressors (87/2:145).

He ended up accepting differences among the various communities as an expression of divine will and that it was up to God to reconcile divergences in opinion in the Hereafter:

Had God wished, he would have made you only one nation. But [he wants] to examine you in what he gave you. So race each other to the good. To God will be your return altogether and he will inform you about that wherein you were diverging [112/5:48].

Had your Lord wished, he would have made the humans one nation. Yet they do not cease diverging (52/11:118; see also 70/16:93 and 62/42:8).

Since divergence in opinion is willed by God, the Koran rejects recourse to constraint in the attempt to convert members of other communities: "There is no compulsion in religion!" (87/2:256), without for that matter ever giving up on them becoming Muslims one day. It recommends the companions of the Prophet to

adopt a correct attitude towards the People of the Book and exhorts the latter to reach a common understanding with the Muslims:

"Do not dispute with the people of the book but with what is best, except those among them who oppressed. Say: "We believed in what was descended to us and what was descended to you. Our God and your God is one. We are to him submitters" (85/29:46, see also 89/3:64; 70/16:125).

This theological debate is determinant for the legal status of non-Muslims, a status that is principally governed by four verses:

Combat those who do not believe neither in God nor in the last day, nor forbid whatever God and his messenger have forbidden, nor profess the religion of the truth, among those who were given the book, until they give the tribute with a [willing] hand, while they are belittled (113/9:29).

Those who believed, the Jews, the Nazarenes and the Sabians, whoever believed in God and the last day and does good deeds, will have their wage at their Lord. No fear on them, and nor they be sad (87/2:62).

Those who believed, the Jews, the Sabians, and the Nazarenes, whoever believed in God and the last day and did good deeds, no fear on them, and nor they be sad (112/5:69).

Those who believed, the Jews, the Sabians, the Nazarenes, the Magians and the associators, God will decide between them on the day of resurrection. God is witness of everything (103/22:17).

The People of the Book living in Islamic territory and whose country is now under Muslim domination are called *dhimmis*, those protected in exchange of the payment of a tribute (*jizyah*). However, the Muslims are to observe constant mistrust against them, even when they have parental relation with them:

O you who believed! Do not take for allies your fathers and your brothers if they love the disbelief more than belief. Those of you that ally to them, those are the oppressors (113/9:23).

O you who believed! Do not take the Jews and the Nazarenes for allies. They are allies of each other. Whoever among you allies to them is of theirs. God does not guide the oppressive people (112/5:51, see also 89/3:28 and 113/9:8).

It should not exclude, for that matter, relations based on justice, except in case of hostility:

God does not forbid you, respecting those who did not combat you in the religion, and did not oust you from your homes, that you be good and equitable with them. God loves the equitable. God only forbid you from allying you to those who combated you in the religion, brought you out of your homes and helped to oust you. Those who ally to them, they are the oppressors (91/60:8-9).

In order to resolve the contradictions which exist between tolerant verses and the less tolerant ones, classic jurists have had recourse to the theory of abrogation, i.e., a verse referring to an issue is abrogated by a later verse referring to the same is-

sue.¹ However, they agreed neither upon the scope nor about the dates of the verses. Some did not hesitate to consider all the tolerant verses of the Koran with regard to non-Muslims as having been purely and simply abrogated by *the verse of the sword*, although the said verse was more concerned with the polytheists:

Once the forbidden months are over, kill the associators wherever you find them. Take them, besiege them and lie in wait for them in every ambush. If they repent, perform the prayer and give the purificating [alms], then let them go their way. God is forgiver, very-merciful (113/9:5).²

2) The system of personality of law

Classic jurists deduced from the above mentioned verses that the People of the Book, i.e., Jews, Nazarenes, Sabians and Zoroastrians, to which are added the Samaritans, have the right to live in a Muslim State in spite of theological divergences. More so, the religious leaders of these communities had the right and even the duty to enjoin them the respective laws revealed by God through earlier prophets. This was expressed in a long passage which has been the basis of what is called the personality of law and jurisdiction. We quote the passage in its totality:

They are hearers to lies and eaters of what is fraudulent. If they come to you, judge between them or disregard them. If you disregard them, they will not harm you in anything. If you judge, then judge between them with equity. God loves the equitable. How do they make you a judge while they have the Torah wherein is God's judgment? And thereafter, they turn the back. Those are not believers. We descended the Torah wherein is guidance and light. By it, the prophets who submitted, as well as the rabbis and the doctors judge the Jews. For to them was entrusted the protection of God's book, and they were witnesses thereto. Therefore do not dread the humans, but dread me. Do not exchange my signs with a small price. Those who do not judge by that which God descended, they are the disbelievers. We prescribed for them therein: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and for wounds retaliation. But whoever forgoes it, this shall be for him an expiation. Those who do not judge by that which God descended, they are the oppressors. Then we sent after them in their footsteps Jesus, son of Mary, confirming what is before him of the Torah. We gave him the Gospel wherein is guidance and light, confirming what is before it of the Torah, guidance and exhortation for [God-]fearing. The people of the Gospel should judge by what God descended therein. Those who do not judge by that which God descended, those are the perverse. We descended to you the book with the truth, confirming what is before it of the book and predominant on it. Therefore judge between them by what God descended and do not follow their desires, far from the truth that came to you. To each of you we made legislation and conduct. Had God wished, he would have made you only one nation. But [he wants] to examine you in what he gave you. So race each other to the good. To God will be your

¹ Cf. Abrogation Part III, Chapter I.I.

² Ibn-Hazm: *Ma'rifat al-nasikh*, vol. II, p. 146-148; Ibn-Salamah: *Al-nasikh*, p. 19, 27, 29, 42, 45, 49, 54, 57, 61 etc.

return altogether and he will inform you about that wherein you were diverging. Therefore judge between them by what God descended and do not follow their desires. Beware of them lest they divert you from some of what God descended on you. If they turn the back, know that God wants to afflict them for a part of their faults. Many humans are perverse. Do they seek the judgment of [the epoch of] the ignorance? Who is better judge than God for convinced people? (112/5:42-50).

In virtue of this passage, the Muslim State retained political power, but it did not have at its disposal the power to legislate neither for the Muslims nor for the non-Muslims, since law is the handiwork of God and not of men. Moreover, judicial power over non-Muslims eluded the Muslim State.

According to this system, each community was to have its own tribunals and laws. The latter were necessarily divergent. Thus, a Muslim could marry four women, whereas a Christian could only marry one. It was forbidden for a Muslim to drink wine and to eat pork, whereas a Christian could do so. Problems arose when it was question of relations involving people of different religious communities. In order to regulate these relations, it was necessarily the law of the strongest that prevailed. Hence, a Muslim could marry up to four Christian or Jewish women, whereas the Christian and the Jew were forbidden to marry Muslim women. Children born of a mixed marriage between a Muslim man and a Christian or Jewish woman are necessarily Muslims. In matters of inheritance, each community had its own laws, but the Muslim law forbade inheritance among people belonging to different religious communities. Thus, a Christian or a Jewish spouse of a Muslim cannot inherit from her deceased husband or her children and a Muslim husband and his children cannot inherit from a Christian wife. In matters of religious freedom and freedom of expression, a Christian can become a Muslim (and marry four wives), but a Muslim can never abandon his faith. The apostate must be separated from his Muslim wife, his children and his belongings, and even put to death. The one responsible for his conversion runs the risk of the same punishment. A Christian can practice his religion, under a few restrictions in what concerns the construction of churches. What's more, he cannot criticize the Muslim faith (cf. the law of blasphemy in countries like Pakistan) and yet a Muslim can criticize the Christian faith, in spite of the fact that a Muslim is obliged to respect the prophets that preceded Muhammad.

II. The People of the Book in Arabia

The toleration of the People of the Book did not include those who lived in Arabia. Muhammad, from his deathbed, is said to have called upon 'Umar (d. 644) the future 2nd Caliph saying: "Two religions must not co-exist in the Arabian Peninsula."¹ It was no longer sufficient for the Nazarenes to pay the tribute, like did their coreligionists in the other regions dominated by the Muslims. Narrating what was said by Muhammad, Al-Mawardi (d. 1058) wrote: "The tributaries were not allowed to settle in the Hejaz; they could go nowhere for more than three days." Even their corpses could not be buried therein and if that "happened, they would be exhumed

¹ Malik, hadith 1388.

and transported elsewhere, for inhumation is equivalent to a durable stay."¹ Classic Muslim jurists did not agree with regard to the geographical limits within which this norm was to be applied. Today, only Saudi Arabia evokes it in order to limit, within its territory, all the non-Muslims their right to practice their rites, and yet it allows American troops to station on its soil.

III. Polytheists

The polytheists, those who do not possess revealed books, seem to have enjoyed, according to the above-mentioned verse 103/22:17, some kind of toleration on the part of Muhammad, at the beginning of his mission, like did the People of the Book. A text of the Koran referenced by Al-Tabari (d. 923) goes as far as recognizing three of their divinities: Al-Lat, Al-'Uzzah and Manat. However, in the face of the criticisms of his companions who saw in this the undermining of monotheism, Muhammad denounced the passage as having been revealed by Satan (hence, *The Satanic Verses* of Salman Rushdie). Although the verse disappeared from the Koran, it has left behind some imprints which confirm the polemics it provoked:

Have you seen Al-Lat and Al-Uzza, and the other, Manat, the third? Do you have the male, while he has the female? That is a disgraceful division! They are nothing but names you have named, you and your fathers and for which he did not descend any [argument of] authority. They only follow the presumption and what [their] souls desire, whereas the guidance has come to them from their Lord 23/53:19-23).²

Muhammad also admitted the possibility of signing a pact with the polytheists:

Except those of the associators with whom you covenanted, provided they have not failed you in any respect nor supported anyone against you. Fulfill their covenant until their term 113/9:4).

However, this was denounced:

How would there be for the associators a covenant with God and his messenger?... How is it that when they prevail against you, they regard not pact nor honour in respect of you... They regard not pact nor honour in respect of a believer... 113/9:7-11).

Hence, the polytheists were enjoined either to convert or to face war until death, as indicated by the above-mentioned verse 113/9:5, known as *the verse of the sword*.

IV. Apostates

The Koran does not impose Muslim faith on non-Muslim monotheists; but a Muslim, whether born in a Muslim family or a convert to Islam, has no right to abandon his religion. It is therefore a question of unilateral religious freedom. The Koran has not prescribed specific punishments against the apostates although it refers to them many times either through the term *kufr* (disbelief),³ or that of *riddah* (apostasy).⁴ Only the punishment in the Hereafter has been prescribed by the Koran, ex-

¹ Mawerdi: *Les statuts gouvernementaux*, p. 357.

² See Part III, Chapter I.I.4.F.

³ See verses 87/2:217 and 95/47:25-27.

⁴ See verses 87/2:208; 3:86-90, 177; 4:137; 113/9:66, 74, 70/16:106-109.

ception made of verse 113/9:74 which speaks of a painful punishment in this world, without giving any precision as to what that may apply:

If they turn the back, God will punish them with a painful punishment, in the worldly life and the last [life].

The hadiths on the other hand are more explicit:

Whoever changes his Islamic religion, kill him.¹

It is not allowed to have an attempt on the life of a Muslim except in the following three cases: disbelief after having professed faith, adultery after marriage and homicide without any motivation.²

Al-Mawardi (d. 1058) defines the apostates as follows:

They are those who while being legally Muslims, either by birth or following conversion, stop being so, and the two categories are, from the point of view of apostasy, on the same level.³

Basing themselves on Koranic verses and hadiths, classic jurists have foreseen death penalty for the apostate, after having accorded him a delay of three days for reflection. In the case of a woman, some jurists prescribe life imprisonment until death or the return to Islam.⁴ The question of a civil death also affects the apostate: his marriage is dissolved, his children are taken away from him, the procedure for his succession is initiated, and he is deprived of the right of succession. Collective apostasy leads to war. The fate reserved for the apostates is even worse than the one reserved for the polytheists. No truce is foreseen for the apostates.

¹ Al-Bukhari, hadiths 2794 and 6411; Al-Tirmidhi, hadith 1378; Al-Nasa'i, hadiths 3991 and 3992.

² Ahmad, hadiths 23169 and 24518.

³ Mawardi: *Les statuts gouvernementaux*, p. 109.

⁴ Aldeeb Abu-Sahlieh: *L'impact de la religion*, p. 60-63.

Part II.

Sources of Islamic law

The reader will find in this part sources of the norms meant to guide Muslims in their relations with others (*mu'amalat*) as well as with God (*'ibadat*); they are the Koran, the *Sunnah* of Muhammad and of the companions and the members of his household (*ahl al-bayt*), the laws revealed before Muhammad (*shari'ah man qablana*), custom (*'urf*) and rational effort (*ijtihad*).

Preliminary remarks

After determining who makes the law, namely God, a Muslim asks himself: where is this law to be found? The question concerns sources of Islamic law.

Determining the sources of Islamic law constitutes the first task of the science of the principles of jurisprudence (*usul al-fiqh*). It is to such laws that the Muslim refers himself to regulate his attitude to other human beings (*mu'amalat*) and to God (*'ibadat*) in order to be in conformity with the divine will. Without such conformity, one ceases to be Muslim.

The Koran says:

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

God, therefore, enjoins every Muslim to obey, above all, the Koran, then Muhammad his messenger and finally those who have authority (that is, the experts in matters of religion; not necessarily the State authority).

Muslim jurists are fond of recalling the incident where before sending Mu'adh Ibn-Jabal (d. 639) to exercise the function of judge and to teach religion in Yemen, Muhammad asked him how he foresaw delivering his sentences. He replied: "According to the book of God." And if you find nothing therein? He replied: "I will follow the *Sunnah* of the messenger of God." And if you still do not find anything? He replied: "I will strive as much as possible to reason."

Works dealing with the principles of Islamic law classify sources of Islamic law into two categories in accordance with their origins:

- Transmitted sources (*naqliyyah*): They comprise, above all, sources of revealed character, namely, the Koran, the *Sunnah* and norms revealed before the advent of Islam (*shari'at man qablana*). And then non-revealed sources, namely, consensus (*ijma'*), custom (*'urf*) and the opinions of the companions of Muhammad (*ra'y*).
- Rational sources (*'aqliyyah*): They are procedures adopted for the deduction of norms, namely, analogy (*qiyas*), juristic preference (*istihsan*), the presumption of continuity (*istishab*), etc.

Salim Rustum Baz (d. 1920), a commentator of the *Majallah*, considers the sources of law to be four in number: the Koran, the *Sunnah*, consensus (*ijma'*) and analogy (*qiyas*).¹ Some authors consider some rational sources as instruments of logic or as juridical principles at the service of the principle sources. Such is the case especially for analogy. For these authors, the sources would be three in number: the Koran, the *Sunnah* and the rational effort (*ijtihad*). The majority of the authors, however, have critically revised the different sources, by order of their importance, without being interested in the question of methodology in particular, while highlighting the challenges they face from such and such a school. All these authors start with the Koran, considered the first source of Islamic law.

Sources of Islamic law could be classified, in accordance to their formal nature, as follows:

- The Koran together with exegeses (*tafasir*) and works related to the contexts in which its verses were revealed (*asbab al-nuzul*).
- The different collections of the *Sunnah* and their exegeses.
- The biographies of Muhammad (*sirah*), as a complement to the *Sunnah* of Muhammad.
- Works dealing with the principles of jurisprudence (*usul al-fiqh*) as a method for the deduction of norms.
- General treatises, judiciary decisions (*'amal*), collections of *fatawa* (religious opinions) and monographs edited by classic jurists or contemporary authors.
- Legislative texts which Muslim States adopted through the inspiration of Islamic law in particular domains, notably in matters of family and succession law.

It is worth noting that classic formal sources are all written in Arabic language, the language of the Koran. However, there exist also translations of some of the sources. In what concerns the Koran and the *Sunnah*, only texts in Arabic language are deemed reliable. Similarly, every jurist involved with Islamic law must imperatively understand the Arabic language.

Chapter I. The Koran

The Koran is the first source of Islamic law. Some contemporary Muslim movements even consider it their constitution. However, the Koran cannot be read as one reads a novel or any normal juridical piece of work. The aim of this chapter is to facilitate the reference to the Koran for the non-Muslims. We shall endeavour to quote Koranic verses where necessary so that the reader may become familiar with its content and avoid referring back to it every now and then.

In what concerns the abrogated and the abrogating verses, the chapter is complemented by the first chapter of part III. The reader will also find at the end of the

¹ Baz: *Sharh al-majallah*, p. 16.

book an analytic juridical table of the Koran whose norms are classified under twelve rubrics.

I. Description of the Koran

1) Historical references

Muhammad was born around the year 570 in Makka, a mercantile and cosmopolitan town of Arabia where different religious communities, principally polytheists, Jews and Nazarenes, lived side by side. At the age of 40, he had an extraordinary experience; he received a message through a supernatural being, the angel Gabriel. In 622, due to persecutions by his own kindred and his fellow citizens, he escaped together with some of his companions from Makka to Yathrib, his mother's hometown, known as Medina since then. The date became the inaugural reference of the lunar Muslim calendar. In 630, he came back to Makka with an army and peacefully marched on it. In 632, he died after a short illness. The revelations he had received over a period of twenty years were compiled through State order and became the Koran of today, distinct from the narrations attributed to him which had been the object of multiple private collections.

The Koran (*Al-Qur'an*) is the most used name to designate the sacred book of the Muslims. The term, mentioned around sixty times within the Koran itself, signifies reading or recitation. The term *Mushaf* (book) is also used. In fact, there are 55 different names for it in the Koran itself.¹

2) Koran, the revealed text

A) The concept of revelation

Every religious community Muhammad met believed in some form of extra-terrestrial forces which communicated, through some mediums, the norms meant to regulate the life of human beings and to assure their fate in this life and in the life to come. His compatriots considered him to be a sorcerer (*sahir*: 67/51:52), a soothsayer (*kahin*: 76/52:29; 78/69:42), someone possessed by the jinn (*majnun*: 67/51:52; 76/52:29-30; 56/37:36), or even a poet (*sha'ir*: 73/21:5; 41/37:36; 76/69:41). As for Muhammad, he claimed himself to be a messenger (*rasul*) and a prophet (*nabi*),² one divinely invested with the mission to unveil for human beings God's will.

Being a prophet was an honour among Jews and Nazarenes. At the time of Muhammad and after his death, many people tried to attribute themselves the title in order to dominate the people. To avoid all forms of rivalry, the Koran declared Muhammad the last of the prophets (Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets - 90/33:40), and Muslim authorities have been ruthless against any person pretending to be a prophet after Muhammad.³ The greatest Arab poet was imprisoned for having pretended to be able to produce a Koran similar to the one of Muhammad. He was freed only

¹ Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. I, p. 10.

² Messod and Roger Sabbah consider that the Hebrew term *nabi* (prophet or custodian of the law), employed also in Arabic, comes from Anubis (pronounced *Anabi* or *Anapi* in Egyptian). Anubis is a dog in charge of watching over the tomb (Sabbah, p. 13).

³ See the work of Hasan: *Ad'iyat al-nubuwwah*, p. 43-135.

after proof of sincere repentance. Nonetheless, they continued to call him Mutanabbi (d. 965, the so-called prophet). It is under this nickname that he is taught in schools today. As late as the 20th century, the Ahmadiyyah movement continued to receive wide Muslim condemnation for considering its founder Mirza Ghulam Ahmad (d. 1908) and his successors to be prophets, in the same capacity as Muhammad.

The prophet (*nabi*) is one who unveils information (*naba'*) coming from an external beneficent source (Allah) or a malefic source (*shaytan*). He receives this revelation by means of revelation (*wahy*) or a transmission descending from above (*tanzil*). This is the idea expressed in the following two verses:

When they went away with him, and conferred to put him down into the bottom of the pit, we revealed to him: "You will inform them of this their affair, while they do not perceive" (53/12:15).

The hypocrites are wary that a chapter be descended on them informing them about what is in their hearts. Say: "Mock on! God will bring out what you beware" (113/9:64).

Muhammad started to receive revelations from God around the year 610, during the month of Ramadan, during the "Night of Destiny" (25/97:1; 64/44:3; 87/2:185). He was 40 years of age at the time. The period of revelations ended with his death in 632. In all, it lasted 22 years: 12 years before the departure from Makka and 10 years after. For the Muslims, the Koran is believed to be a divine revelation, dictated word by word by God himself through the Angel Gabriel.

In order to express the notion of revelation, the Koran uses the term *nazila* (to descend) and *nuzul* (descending), the same term as the one used for describing water falling from heaven. Both terms are used not only for the Koran, but also for the Torah and the Gospel.

It is we who descended on you the Koran in a repeated way (98/76:23).

He descended to you the book with the truth, confirming what is before it. He descended the Torah and the Gospel before, as a guidance for the humans. And he descended the salvation. Those who disbelieved in God's signs will have a severe punishment! God is mighty, avenger (89/3:3-4).

The Koran also uses such terms as *awha* (to reveal) and *wahy* (revelation), which also serve to designate the instinctive norms God has established for animals such as bees:

It has been revealed to you and to those before you: "If you associate, your work will fail; and you will be of the losers (59/39:65).

Your Lord revealed to the bees: "You shall take homes of the mountains and of the trees and of what they erect. Then eat of all fruits and walk humbly in the ways of your Lord." From their bellies comes a drink with different colours in which there is healing for the humans. Therein is a sign for a people who think (79/16:68-69).

The Koran says it originates from a tablet preserved by God. Elsewhere it speaks of *um al-kitab* (Mother of the Book, the archetype of Scripture), to designate the original version:

It is rather a glorious Koran (27/85:21-22).

God erases and consolidates whatever he wishes, and with him is the mother of the book (96/13:39).

We made it an Arabic Koran. Maybe you discern! It is before us, in the mother of the book, very high, wise (63/43:3-4).

The word tablet as used by the Koran indicates also the tablets on which God wrote the Torah for Moses:

We wrote for him, on the tablets, an exhortation of everything, and an expounding of everything. "Take them with strength and order your people to take the best from them. Soon I will make you see the home of the perverse (39/7:145).

When Moses returned to his people, angry and sorry, he said: "What an awful that you designated as successor after me. Would you hasten the order of your Lord?" He threw down the tablets... " (39/7:150).

The Koran further states that God employs three approaches to address himself to man:

or he couples them, males and females; and he makes sterile whom he wishes. He is knower, powerful. It is not for any human that God should speak to him except by revelation, or from behind a veil, or that he send a messenger to reveal whatsoever he wishes by his permission. He is very high, wise (62/42:50-51).

The term "inspiration" in this verse would be, for some, the equivalent of the word revelation. For others, it may designate the Angel Gabriel in charge of revelation:

Say: "Who is the enemy of Gabriel?" It is he who, with God's permission, descended it upon your heart, confirming what is before it, guidance and announcement to the believers (87/2:97).

Muslim Tradition has conserved descriptions of how the revelation took place. Muhammad would enter into trance, experience exhaustion and transpire,¹ leading his adversaries to suspect that he was possessed by a jinn. The Koran seems to resonate this state of affairs when it says: "We will throw on you a heavy word" (3/73:5). It is said of Muhammad that sometimes the Angel Gabriel used to appear to him in form of Dihyah Al-Kalbi, one of his companions reputed to be of good looks, or in the form of an unknown Bedouin.² All religions are familiar with the phenomenon of prophecy and the extreme manifestations that accompany it; ecstasy, paralysis, stupor, fainting fits, convulsions, etc. In all such cases, the prophets who went through such experiences claimed that they transmitted words, orders or

¹ http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter1/Ch_1_06.htm.

² Abu-Shahbah: *Al-madkhal*, p. 57-62.

prohibitions commanded by another being. In the Bible, revelations transmitted by different prophets are narrated in form of oracles originating from God.

Muhammad perceived Koranic revelations as a follow-up to the revelations received by the previous prophets:

We revealed to you as we revealed to Noah and the prophets after him. And we revealed to Abraham, Ismael, Isaac, Jacob, the Tribes, Jesus, Job, Jonah, Aaron and Salomon. And we gave David a scripture (92/4:163).

Say: "We believed in God, in what was descended to us, in what was descended to Abraham, Ismael, Isaac, Jacob and the Tribes, in what was given to Moses and Jesus, and in what was given to the prophets, [coming] from their Lord. We do not distinguish between anyone of them. We are submitters to him" (87/2:136).

Some have attempted to examine the general phenomenon of revelation in the light of psychoanalysis.¹ There have also been cases of imposture, just as there are individuals who believe sincerely that they have received audible, visual or intelligible messages from the other world "but for whom sincerity is not the proof that the messages truly come from where they purport to come," to use the words of Rodinson (d. 2004). For him, Muhammad is comparable to the mystics of other religions who had behaviours similar to those of the individuals struck by manifest mental sicknesses. He makes a distinction between the first messages and the later ones received by Muhammad. Concerning the first messages, "it is a lot easier to perceive Muhammad as being sincere than as him being an imposter." Messages revealed later, on the contrary, pose problems because they comprise responses to pressing questions. With regard to these questions, Muhammad gave in to "the temptation of giving a push to the truth."² We shall see some examples in the subsequent point which is dedicated to the causes of revelation.

This distinction was also sustained by Ibn-Warraaq, a pseudonym of a Muslim who had declared himself an atheist. In his view, "we can affirm without hesitation that in Makka Muhammad was absolutely sincere about having been spoken to by God. However, in no way can it be denied that in Medina his behaviour and the nature of his revelations had changed." In Medina, he adds, Muhammad "consciously invented revelations often for his personal convenience, in order to resolve his domestic problems."³

Professor Watt (d. 2006), an Anglican scholar and priest, considered Muhammad to have been a man endowed with the kind of creative imagination found among artists, poets and some authors, an imagination shared by prophets and religious leaders with a prophetic character. Watt did not resolve the question of the origin of the imagination, but he reckoned that the ideas of Muhammad were not always correct. Nonetheless, by the grace of God, his ideas led millions of people to a better religion than their previous one.⁴

¹ See the debate about the question in Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. I, p. 231-237.

² Rodinson: *Mahomet*, p. 102-106.

³ Ibn-Warraaq, p. 409.

⁴ Watt: *Muhammad prophet and statesman*, p. 237-240.

B) Circumstances of revelation

Irrespective of what historians of religions may say, the dominant opinion among Muslim authors is that the sacred books revealed before Muhammad descended, all at once, on their addressees. They quote such Koranic verses as:

We wrote for him, on the tablets, an exhortation of everything, and an expounding of everything. "Take them with strength and order your people to take the best from them. Soon I will make you see the home of the perverse (39/7:145).

When Moses' anger was stilled, he took the tablets. In their inscription there were guidance and mercy for those who dread their Lord (39/7:154).¹

As for the Koran, it came down in fragments, at intervals, in series of five, or even ten verses at a time. The Koran says:

Those who disbelieved said: "If only the Koran was descended to him all at once!" [We revealed it] so to strengthen with it your heart, and we recited it carefully (42/25:32).

We have divided up the Koran, so you can recite it to the humans slowly. We descended it in a repeated way (50/17:106).

Revelation was often associated with particular circumstances, usually in response to questions arising from within the entourage of Muhammad. For a proper understanding of Koranic verses, it is necessary to be aware of such circumstances (*asbab al-nuzul*). They help to interpret norms and to perceive how far the norms can be used, by analogy, to regulate domains other than the ones for which they were originally conceived. The causes of revelation rarely appear in the Koran. They are found in the collections of the *Sunnah* (hadiths), the biographies of Muhammad (*sirah*) and the exegeses of the Koran (*tafsir*). They are also collected together in monographs, of which the most important are: *Asbab al-nuzul* of Al-Nisaburi (d. 1015) and *Lubab al-nuqul fi asbab al-nuzul* of Al-Suyuti (d. 1505). The latter is often published in the margins of the Koran in Arabic. However, it is necessary to point out that Muslim sources are not unanimous about these causes. This is one of the reasons for the divergences among the jurists.²

Although Muslims consider the Koran as being of divine origin, some of the followers of Muhammad saw it as an instrument at his own disposal. One day a woman proposed herself to Muhammad for marriage and he married her. Ayshah thought that this attitude was unworthy of him and made him aware of it. Immediately after, Muhammad received from heaven the following verse to silence his critics:

O Prophet! We permitted to you... and [any] believing woman if she gives herself to the Prophet and the Prophet wants to marry her, as a privilege given only to you and not to the believers (90/33:50).

¹ Abu-Shahbah: *Al-madkhal*, p. 54-56.

² Concerning the circumstances of revelation, see Abu-Shahbah: *Al-madkhal*.

To which Ayshah responded: "I see that God makes haste to satisfy your desires."¹ The Koran mentions only this much. For more details, you have to refer to works related to the circumstances of revelation (*asbab nuzul*) and the collections of the *Sunnah* (hadiths).

One day, Muhammad saw Zaynab, the wife of his adopted son Zayd. He fell in love with her. A Koranic verse was revealed and approved of his feeling by making him understand that he did not have to conceal his sentiments. Zayd hurriedly divorced his wife so that Muhammad could marry her and the marriage was sanctioned by a Koranic verse. To silence the critics, another verse was revealed prohibiting adoption. Two passages of the Koran, separated by around thirty verses, refer to this incident:

O Prophet! Fear God and do not obey the disbelievers and the hypocrites. God was knower, wise. Follow what is revealed to you from your Lord. God was aware of what you do. Confide in God. God suffices as guardian. God has not made to a man two hearts in his inside... nor has he made those whom you asser to be your sons your real sons; these are the words of your mouths. But God says the truth. It is he who guides to the way. Call them [by the name] of their fathers. It is more equitable with God. But if you do not know their fathers, then [they are] your brothers in the religion or your allies. There is no blame on you for what you committed by error, but for what your hearts do deliberately. God was forgiver, very-merciful (90/33:1-5).

It is not for a believer man or woman, when God and his messenger have decided on a matter, to claim freedom of choice in their matter: whoever disobeys God and his messenger is manifestly misguided. In that time, you said to him who has been favoured by God and favoured by you: "Keep your wife and fear God." You hid in yourself what God was to divulgate, and you feared the humans, whereas God has more right to be feared by you. When Zayd had accomplished his want of her, we had you marry her, so there should be no blame for believers in respect of the wives of their adopted sons, when they have accomplished their want of them. God's order must be fulfilled. There is no blame on the Prophet in doing anything that God imposed to him. It is God's law for those who passed before. God's order is a predetermined predetermination. Those who deliver God's messages, dread him and do not dread anyone but God [...]. God suffices as accountant. Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets. God was knower of everything (90/33:36-40).

The Koran does not mention the name of Zaynab. The name and the details of the incidence are found in the collections of the *Sunnah* and the biographies of Muhammad (*sirah*).² This episode of the affective life of Muhammad has been at the origin of the prohibition of adoption that is effective in Muslim countries to date.

¹ Al-Suyuti: *Asbab al-nuzul, commentary of this verse*; Al-Bukhari, hadith 1761; Ahmad, hadiths 11857 and 24091.

² Concerning this matter see, Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. I, p. 207-214.

Besides the circumstances of revelation (*asbab al-nuzul*), it is important to know the customs of the Arabs during the time of Muhammad without which it is not possible to understand certain practices. Such is the case, for example, for the minor and the major pilgrimage (*'umrah* and *haji*) to Makka which the Arabs practiced before the coming of Muhammad and which is a question of in the verse: "Fulfil the pilgrimage and the visit for God" (87/2:196).

C) Sources and inspiration

The Koran narrates many accounts and facts traces of which can be found in the Old and New Testaments, apocryphal gospels and the rabbinic literature. During the time of Muhammad, there were pockets of Nazarenes and Jews in Arabia. According to Muslim sources, the Temple of Makka contained, besides pagan idols, images of Abraham, Mary and the Child Jesus.

Muslims consider the Koran to have originated from God. However, the contemporaries of Muhammad used to reproach him of plagiarism, an accusation Muhammad rebuffed saying:

Those who disbelieved said: "This is only a perversion that he forged, and other people have helped him at it." Thus they committed oppression and a lie. They say: "Legends of the first which he has got them written! They are dictated to him morning and evening!" Say: "He who knows the secret in the heavens and the earth descended it. He is forgiver, very-merciful" (42/25:4).

We know that they say: "It is only a human who teaches him." The language of the one they refer to is foreign, and this is a manifest Arabic language (70/16:103).

Thus, we see that the sources of the Koran were the object of polemics even during the time of Muhammad. Definitely, the author of the Koran had access to the sacred texts of the Nazarenes and Jews. Talking about the Nazarenes, he said: "They are not equal. Among the people of the book, there is a nation that, standing, recite God's signs a part of the night, while prostrating" (89/3:113). Challenging the Jews, he said: "Bring the Torah and recite it, if you were truthful!" (89/3:93). The biographies of Muhammad mention the fact that a relative of Muhammad called Waraqah Ibn-Nawfal was a priest (or bishop) who could write in Hebrew and who had translated the Gospel into Arabic. He had presided over the marriage of Muhammad and Khadijah and survived him by fifteen years.¹ The biographers of Muhammad also teach us that he had an encounter with a certain monk called Bahira during one of his journeys into Bilad Al-Sham (Syria). For the Muslims, the similitude between the Bible and the Koran is not because Muhammad copied or was familiar with Jewish and Christian texts, but rather to the fact that the Bible and the Koran have a common author, God. This is the reason why Muslim authors usually do not delve into comparative studies in order to establish the origin of the Koranic passages in the previous sacred books. For such authors, the Koran is entirely of divine origin and Muhammad is only an instrument of transmission totally at the

¹ Al-Haddad: *Durus qur'aniyyah: Mu'jizat al-Qur'an*, p. 185-186.

service of God, having no personal impact on the revealed message.¹ A theological debate, with tragic consequences, took place among the Muslims; is the Koran a created book, or is it a book that has existed from all eternity? The incident came to be known as *mihnah* (inquisition). Four months before his death, the Caliph Al-Ma'mun (d. 833) gave the order to dismiss and to persecute judges and religious scholars who were pretending that the Koran has always existed, since eternity. He also ordered the refusal of the testimony of those who professed this doctrine. The inquisition was pursued until 851, during the reign of the Caliph Al-Mutawakkil (d. 861).

D) Questioning revelation

The perception of the Koran as a revealed book was not accepted by all. Atheistic or deistic trends of thought have always existed among Muslims, but they have remained a minority due to the repression of which they have been victim. Their writings have been, for the greater part, lost; only excerpts quoted by their adversaries are known.² Such was the case for the famous philosopher-doctor Muhammad Ibn-Zakariyya Al-Razi (d. 935; Rhazes in Latin). He affirmed:

God supplies us with what we need to know, not as an arbitrary devolution or cause of discord about any particular revelation, marked by blood and disputes, but rather in form of reason, a quality common to all. Prophets are, at best, imposters, haunted by the devilish shadow of agitated and envious spirits. Yet, ordinary man is perfectly capable of thinking by himself and has no need of guidance whatsoever.

Queried as to whether a philosopher can follow a revealed religion, Al-Razi retorts:

How can one think philosophically if one has resigned oneself to old wives' tales based on contradictions, hard-boiled ignorance and dogmatism?³

3) The Koranic text

A) Codification of the current text

According to the Muslim tradition, the passages of the Koran had already been committed to writing at the time of Muhammad. As soon as a revelation was made to Muhammad, his scribes noted it down on patches of leather, pottery shards, median veins of palms, shoulder blades or ribs of camels. Also according to the Muslim tradition, Muhammad used to specify for them the exact place of these verses in the respective chapters. Today, Sabih, a Muslim author, doubts such traditions, at least in what concerns the part revealed in Makka. Such a quantity would have required twenty camels to be transported from Makka to Medina during the flight from Makka to Medina (*hijrah*). A fact not reported by anybody.⁴ In order to cir-

¹ Abu-Shahbah: *Al-madkhal*, p. 84-100.

² The interested reader can consult the work of Badawi: *Min tarikh al-ilhad fil-islam*.

³ *The Encyclopaedia of Islam*, New Edition, vol. 8, p. 492.

⁴ Sabih: *Bahth*, p. 72.

cumvent the objection, Asbindari, a contemporary author, considers that the revelation of the Makkan period was written on papyrus or on parchments.¹

Besides such written forms, the companions of Muhammad also preserved the Koran through memorization. After his death, the first compilation of the Koran was done, during the reign of Abu-Bakr (d. 634), under the suggestion of 'Umar (d. 644), the second Caliph. The first compilation is said to have been safeguarded by Abu-Bakr and, after his death, by his daughter Hafsa (d. 666), the widow of Muhammad. Divergent private compilations were also put into circulation. To bring this to an end, the Caliph 'Uthman (d. 656) decided to compile his own edition. Muslim sources do not tell us why he did not content himself with referring to Hafsa's edition to confront authors of the other compilations.

Nonetheless, to establish his own edition, the scribes he appointed had to have recourse to the testimony of some companions and, in case of divergence, they consulted with him in order to favour one version against the other. Such a procedure of editing proves that the Koranic edition of 'Uthman (d. 656) is not the same as the one preserved by Hafsa or those established by some companions of Muhammad. After having compiled his text, 'Uthman is said to have ordered several copies which he sent to regions dominated by Muslims, and gave orders to have all the other private compilations of the Koran burnt, not without reservation on the part of their proprietors. The original text kept by Hafsa was the only one to survive; the Caliph Marwan (d. 685) destroyed it, out of fear that some sceptics express some doubts over the leaflets or that they say that some of the passages contained therein had not been received in written form. Had Marwan then proceeded with compiling a new edition of the Koran, the reason for which he may have destroyed the text of Hafsa? It is impossible to respond to this question due to the fact that there does not exist today any manuscript that goes back to 'Uthman (d. 656). In spite of that, Muslim authors have established the dogma according to which the Koran of 'Uthman constitutes the only authentic text and that it conforms to the revelation received by Muhammad. Whoever would doubt this would be considered an apostate deserving capital punishment. The dogma is based on a divine promise:

It is we who descended the remembrance, and we who will protect it (54/15:9).

It is, however, important to point out that although Sunnite and Shi'ite Muslims today have the same text of the Koran, with some minimal divergences, some Shi'ites accuse 'Uthman (d. 656) of having suppressed or modified the passages which mention 'Ali (d. 661), his political rival. Some whole chapters and several verses may have also disappeared from the Koran established by 'Uthman. Muhammad Mal-Allah, a Sunni author, presents 208 examples of falsifications alleged by the Shi'ites.² Without denying that some Shi'ite trends may have alleged the falsification of the Koran, a small anonymous piece of work, with no editor and no publisher, denies the attribution of such allegations to Shi'ism. It adds that allega-

¹ Asbindari: *Kitabat al-Qur'an*, p. 110-122. In this regard, the Koran indicates as material support for writings: *sahifah* (pages), *qirtas* (papyrus) and *raq* (parchments).

² Mal-Allah: *Al-shi'ah*.

tions of falsification are also found in greater numbers in Sunnite documents.¹ Thus, chapters 113/9, 54/15, 102/24 and 90/33 which counted 129, 99, 64, and 73 verses, respectively, are said to have originally counted 286, 199, 100 and 200 verses.²

Some Mu'tazilites, faithful to their concept of a God who is equitable and infinitely good, refuse to consider as being of divine inspiration the imprecations against the personal enemies of Muhammad contained in the Koran. On the other hand, Kharijites deny that chapter 12 related to Joseph is part of the Koran, pretending that it is simply a story and that it was not at all admissible that a love story could be part of the Koran.³

The following passage continues to attract criticisms by some Muslims:

A messenger came to you from among yourselves, grievous to him is your suffering, careful over you, compassionate, very-merciful to the believers. Then if they turn the back, say: "God is sufficient for me. There is no god but him! I confide in him. He is the Lord of the great throne" (113/9:128-129).

Muslim sources point out that when the committee in charge of establishing the final text of the Koran reached chapter 9, one of the scribes suggested adding the two above-mentioned verses, transmitted only by Khuzaymah Ibn-Thabit Al-Ansari (d. 657), in honour of the Prophet. In order to authenticate the addition of the passage, the committee cited a hadith of Muhammad saying that, "the witnessing of Khuzaymah is worthy the witnessing of two men."⁴ Critics pointed out that the two Makkan verses were found inside a Medinine chapter and Khuzaymah converted later, after the *Hijrah*. Consequently, they argue that they should be removed from the Koran.⁵

Whereas the Muslims are unanimous about the codification of the final text of the Koran under 'Uthman, occidental researchers question such an affirmation. Hence, John Wansbrough considers that the Koranic text is a result of a compilation which lasted scores of years before being accomplished. In his view, there is no proof of the existence of the text up to 691, that is, fifty-nine years after the death of Muhammad, when the dome of the Mosque of Jerusalem was built. He cites the fact that the façade of the mosque contains Koranic inscriptions which differ from the Koran we know.

¹ Ukdhubat. Concerning the falsification of the Shi'ites, see also Al-Dhahabi: *Al-tafsir*, vol. II, p. 32-35, 149-152, 184, 196-197.

² Blachère: *Introduction au Coran*, p. 185 and Sfar: *Le Coran est-il authentique?* p. 42.

³ Blachère, *Introduction au Coran*, p. 183.

⁴ Al-Suyuti: *Al-itqan fi 'ulum al-Qur'an*, p. 59. The matter has also been reported by the collection of al-Bukhari.

⁵ The criticism comes from the adepts of Rashad Khalifa who rejects the *Sunnah* and endeavours to prove the divine character of the Koran through mathematical calculations. See the criticism in http://www.submission.org/french/deux_faux_verses_retiens_du_coran.html.

B) Versions of the Koran

a) The Koran, revealed in seven letters

According to one hadith, Muhammad said that the Koran was revealed in *seven letters* (*ahruf*). The meaning of the hadith is controversial. What does the term *letters* mean? Some hold that the Koran was revealed under seven versions which took into account the different Arab dialects in order to facilitate the accessibility of the Koran to the tribes which were not conversant with the dialect of the Qurayshites, the tribe of Muhammad. But, in that case, where have they gone to? Why do we have only one official version, if all the seven versions were revealed? Who decided to suppress the other six? On the other hand, should the figure *seven* be taken in the literal sense or, on the contrary, in the symbolic sense, that is, *many*?

In order to support the explanation for the seven versions, Muslim sources report that 'Umar (d. 644) heard someone recite chapter twenty-five in a different way from what he knew. He took him to Muhammad who made each of them recite his own version and he approved of both, saying that the Koran was revealed in seven letters. Similar narrations have been reported concerning other chapters of the Koran. A clever way of avoiding controversies, attributing the divergences to divine will¹ while recalling the verses (112/5:48; 52/11:118; 70/16:93; 62/42:8) which have decreed that the differences among the different communities were willed by God and they must therefore be tolerated. The University of Kuwait edited a collection of eight volumes based on twenty classic works mentioning 10,243 versions.² Professor Abdelmajid Charfi of the Faculty of Arts and Humanities of Manouba in Tunis leads a group which prepares, since many years, an edition of the Koran that takes into account all the versions available. While waiting for this long-drawn-out job, we published a chronological version of the Koran, in French and Arabic, incorporating the versions found in the above-mentioned Kuwaiti collection.

Sirri, a contemporary author, taking literally the word of Muhammad, considers that the *seven letters* correspond to the following seven types of versions:

- 1) The use of the plural or the singular. For instance, in the verse 58/34:15 the term *maskinihim* (in singular) is written *masakinihim* (in plural).
- 2) The conjugation of verbs; the past, the present or the imperative. For instance, in the verse 58/34:19 the term *ba'id* is written *ba'ad* or *ba'ad*.
- 3) The different declensions of words. For instance, in the verse 87/2:282 the term *yudarra* is written *yudarru*.
- 4) Omission or addition of words. For instance, in the verse 113/9:100 the term *tahtiha* is replaced by *min tahtiha*.
- 5) The reversing of some words. For instance, in the verse 114/110:1 *wa-idha ja'a nasr Allah wal-fath* is written *wa-idha ja'a fath Allah wal-nasr*.

¹ *Al-Mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 110-111.

² 'Umar and Makram: *Mu'jam*.

- 6) Some letters are replaced by others, notably due to the absence of punctuation in the original version. For instance, in the verse 87/2:259 the term *nunshizuha* is written *nunshiruha*.
- 7) Some letters are rendered light in pronunciation. For instance, in the verse 69/18:95 the term *makkanni* is written *makkanani*.¹

b) Variant readings of the Koran

Besides the revelation of the Koran in *seven letters*, Muslim sources speak of the different readings of the Koran. The reading could be because the initial writing of the Koran was difficult to decipher without the help of those who had memorized it. Fourteen readings were thus accepted, with minimal variations among them.² Each of these readings was attributed to a reader supported by a chain of guarantors going back to the companions of Muhammad.³ The Cairo edition, the most widespread today, favoured the one of Hafs, as transmitted by 'Asim. The Tunisian edition follows the reading of Nafi', as reported by the Qalun.

The variants of the Koran, even those which are not found in any of the readings admitted by the Muslims, constitute a precious instrument for understanding the meaning of certain words or for favouring the interpretation of the Koran one way rather than the other.

Hasab-Allah, a contemporary author, gave four examples of the variants taken into consideration by the Hanafite jurists:

- The verse 87/2:196 says: "Fulfil the pilgrimage and the visit for God. If you are restrained, [offer] whatever offering be easy. Do not shave your heads until the offering reaches its destination. Whoever of you is ill or has an affliction to his head, then a ransom by fasting, or alms, or a libation. When you are in security, whoever enjoyed with the visit before the pilgrimage, [he should offer] whatsoever offering be easy. He who cannot find, *then a fast of three days* while on the pilgrimage, and of seven when you have returned; that is, ten in all." One reading proposes: "*then a fast of three consecutive days*." The same problem is found in the verses 112/5:89; 87/2:184; 87/2:185.
- The verse 112/5:38 says: "As to the thief, man or woman, *cut off their hands*, in reward for what they earned, as intimidation from God. God is mighty, wise!" One reading proposes: "*cut off their right hands*." By consequence, Hanafites consider that there is no question of cutting the left hand in case of second offence.
- The verse 87/2:226 says: "For those who swear to abstain from their wives a waiting for four months. *If they recant*, God is forgiver, very-merciful! If they are resolved to repudiate, God is hearer, knower." One reading proposes: "*If they recant during the four months*." This means that the oath is nullified only when there is change of mind during the four months. Once the four months are

¹ Sirri: *Al-rasm al-'uthmani*, p. 36-40. For more information about the *seven letters*, see Abu-Shahbah: *Al-madkhal*, p. 152-196.

² For more information about the variants, see 'Atiyyah: *Rasm al-mushaf*.

³ For more information about the readings, see Blachère: *Introduction au Coran*, p. 118-131; Al-mawsu'ah al-qur'aniyyah al-mutakhassisah, p. 306-358.

over, the man can no longer change his mind about the oath and the repudiation becomes irrevocable.

- The verse 87/2:233 says: "Mothers may suckle their children for two whole years, for he who wishes to complete the suckling. On him to whom the child is born, are their provision and clothing according to usage. No one should be charged but according to his capacity. Neither shall a mother be hurt because of her child, nor shall he to whom the child is born because of his child. *On the heir shall devolve the like thereof.*" One reading suggests: "*On the heir who cannot be married shall devolve the like thereof.*"¹

Those who base themselves on these diverging readings consider that the companions in reporting them considered them to be part of the Koran or at least to be accepted by Muhammad. In the latter case, even if the readings are not part of the Koran they can be considered, at least, as authentic hadiths.²

C) Orthography and grammar of the Koran

a) Primitive Arabic writing

Arabic writing underwent several stages. The currently adopted orthography of the Koran is part of this evolution. At the time of Muhammad, Arabic writing noted consonants and long vowels, but never short vowels. Besides, some letters of identical form noted different consonants. Hence, the same symbol represented b, t, th, n and y. Dots (*nuqat*) help distinguish the consonants from one another and accents (*harakat*) designating the short vowels were later added and progressively introduced into the Koran.³ Without the dots and the accents, the exact reading of the Koran would be practically impossible and would have remained dependent on the people who learnt it by heart (*huffadh*); a fact which led to various variants.⁴

Even with the introduction of dots and accents, the orthography of the Koran diverted sensibly from the one in use since more than a millennium in the other writings of the Arabic language. Within the Koran itself, certain words are written in different ways as shown by the following examples:

- The name Ibrahim (Abraham) is written 15 times in chapter 2 as *Ibrahm* (without *i*), and 54 times elsewhere as *Ibrahim* (with *i*).
- The word *mi'ad* is written without *a* in the verse 88/8:42 and with *a* in others.
- The word *kalimat* is written 21 times with *ta marbutah* and 1 time with *ta maf-tuhah*.
- The word *ni'mat* is written 24 times with *ta marbutah* and 11 times with *ta maf-tuhah*.
- The word *mar'at* is written 4 times with *ta marbutah* and 7 times with *ta maf-tuhah*.

¹ Hasab-Allah, p. 22.

² Rishi: *Al-madhhab al-hanafî*, p. 254-256.

³ For more information on the question, see Sirri: *Al-rasm al-'uthmani*, p. 55-62.

⁴ For more information on the orthography of the Koran, see Blachère: *Introduction au Coran*, p. 150-155.

- The word *sunnat* is written 8 times with *ta marbutah* and 5 times with *ta maf-tuhah*.
- The word *baqiyyat* is written 2 times with *ta marbutah* and 1 time with *ta maf-tuhah*.
- The word *jannat* is written 65 times with *ta marbutah* and 1 time with *ta maf-tuhah*.
- The word *shajarat* is written 17 times with *ta marbutah* and 1 time with *ta maf-tuhah*.
- The word *la'anat* is written 11 times with *ta marbutah* and 2 times with *ta maf-tuhah*.¹

Apart from the orthography, the Koran comprises many solecisms (faulty syntax use). Thus:

- The verses 74/23:82; 56/37:16 and 23/53; 23/53:3; 46/56:47 use the verbal form *mitna* whereas elsewhere is found *muttum* (u instead of i) in the verses 89/3:157-158.
- The verse 92/4:162 uses the form *muqimin* instead of *muqimun*.
- The verse 112/5:69 uses the form *sabi'un* instead of *sabi'in* which is found in the verses 87/2:162 and 103/22:17.

Some classic Muslim authors interrogated themselves about the adaptation of the orthography of the Koran. The majority of them were opposed to such a change, noting that the orthography of the words had been indicated by Muhammad himself to those who were writing down the revelation during his time. Some went as far as attributing esoteric meaning to writing mistakes.² Ibn-Khaldun is of the opinion that the orthography of the Koran is simply defective:

Arabic writing at the beginning of Islam was [...] not of the best quality nor of the greatest accuracy and excellence. It was not (even) of medium quality, because the Arabs possessed the savage desert attitude and were not familiar with crafts. One may compare what happened to the orthography of the Koran on account of this situation. The men around Muhammad wrote the Koran in their own script, which was not of a firmly established good quality. Most of the letters were in contradiction to the orthography required by persons versed in the craft of writing. The Koranic script of (the men around Muhammad) was then imitated by the men of the second generation [...]. No attention should be paid in this connection to the assumption of certain incompetent (scholars) that (the men around Muhammad) knew well the art of writing and that the alleged discrepancies between their writing and the principles of orthography are not discrepancies, as has been alleged, but have a reason [...]. They think that good writing is perfection. Thus, they do not admit the fact that the men around Muhammad were deficient in (writing). They (want to) consider them as perfect by ascribing good writing to them, and they seek to explain (orthographic pecu-

¹ For more information, see Sirri, *al-Rasm al-'uthmani* and 'Atiyyah: *Rasm al-mushaf*.

² Sirri: *Al-Rasm al-'uthmani*, p. 6.

liarities) that are contrary to good orthographic usage. This is not correct. It should be known that as far as (the men around Muhammad) are concerned, writing has nothing to do with perfection. Writing is an urban craft that serves to make a living, as has been shown above. Perfection in a craft is something relative. It is not absolute perfection. A deficiency in (perfection in the crafts) does not essentially affect one's religion or personal qualities.¹

While affirming that Koranic orthography was neither determined by God nor rendered obligatory by Muhammad, Muslim authors consider that the unanimity of the companions of Muhammad is in favour of its preservation. Since, they say, unanimity constitutes an obligatory rule. They add that modification of the orthography leads to variants undermining the uniformity of the text from one country to another. Uniformity of the text is considered one of the aspects of unity among Muslims.²

We need to indicate, nonetheless, that neither the Koran nor the *Sunnah* contains the prohibition of changing the orthography of the Koran. Were one to remain faithful to the original version of the Koran, it would be necessary then to suppress the dots on the letters, the accents and the numbering of the verses, all of which were only added later. The editions of the Koran printed in Istanbul, the Capital of the Ottoman Empire at the time, have in fact added certain letters missing in words such as the letter 'a' in *al-'alamin* and in *muslimat*. In 1988, the publishing house Dar al-shuruq (in Cairo and in Beirut) published a version of the Koran entitled *Al-mushaf al-muyassar* (Koran made easy) with mention, at the bottom of the page, of the actual orthography of the words written in archaic orthography. Koranic quotations in contemporary writings are often in conformity with modern writing and some computer programs use this writing for the text of the Koran or for searching by terms, probably because it is difficult to search a text with an archaic writing. However, to our knowledge, the only complete version of the Koran on paper using the current orthography is the one accompanying the Italian translation made by Shaykh Gabriele Mandel Khan, edited by Utet, Turin, 2004.

Currently, there is the question of wanting to know whether the Koran could be written in Braille for the blind and which orthography should be adopted; the Koranic orthography or the modern orthography? Korans in Braille, with modern orthography, were edited in Jordan, in Tunisia, in Saudi Arabia and in Egypt.³

Apart from the problem of orthography and grammar, one notes that several verses are dislocated and without any logical order, obliging the commentators to reconstruct them in order to understand them. This phenomenon is known by Muslim scholars as *al-muqaddam wal-mu'akhhkar* (the preceding and the following). We give some examples:

- Praise be to God who descended the book on his servant, and did not make a tortuosity therein! A straight [book]... (69/18:1-2).

¹ http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter5/Ch_5_29.htm.

² Sirri: *Al-rasm al-'uthmani*, p. 47-53.

³ For more information about the debate, see Al-Mutlaq: *Kitabat al-Qur'an al-karim bi-khat bryille lil-makfufin*.

The normal structure of this verse is: "Praise be to God who descended the book on his servant! A straight [scripture] and did not make a tortuosity therein!"

- Did you see who took his god for his desires? (42/25:43).

The normal structure of this verse is: "Did you see who took his desires for his god?"

- His wife was standing, and *she laughed*. We announced to her Isaac, and after Isaac, Jacob (52/11:71).

The normal structure of this verse is: His wife was standing. We announced to her Isaac, and after Isaac, Jacob. *She laughed*.

- If not for a word that proceeded from your Lord, [their punishment] would have been obligatory, and a named term, (45/20:129).

The normal structure of this verse is: "If not for a word that proceeded from your Lord, and a named term, [their punishment] would have been obligatory"

- God is quit of the associators and his messenger (113/9:3).

The normal structure of this verse is: "God and his messenger are quit of the associators."¹

These abnormalities reveal at the same time the scruples felt to correct the Koranic text and the concern to preserve the received text in its most ancient form.²

Let us point out finally that the language of the Koran is not accessible to all, even to those whose mother tongue is Arabic. The sense of many pithy terms and passages (notably those situated towards the end of the Koran) remains hypothetical, causing insurmountable problems for the translators.

b) The Koran edited in Syriac language

In a controversial piece of work published in 2000, Christoph Luxenberg, pseudonym of a Lebanese Christian working at a university in Germany whose name has never been revealed, considers that the original version of the Koran was edited in Syriac language, largely diffused at that time, contrary to the Arabic language, which, to go by Muslim sources, was only known by about fifteen people during the lifetime of Muhammad. Zayd Ibn-Thabit (d. ca. 662 or 675), the secretary of Muhammad and the principal person put in charge of compiling the Koran by the first Caliphs, knew how to write in Syriac. Later, the Koran was transcribed into Arabic language without dots distinguishing the consonants from one another and without the accents distinguishing the short vowels from one another. The posterior addition of the dots and the accents was not always beneficial, especially for the words derived from Syriac language and whose meaning escaped the Muslims. This led to aberrations in the comprehension of certain passages of the Koran. In order to understand the true meaning of such passages, Luxenberg strips dots and accents off the words and strives to see if by playing around with the latter it is

¹ For more on these errors, see Al-Suyuti: *Al-itqan fi 'ulum al-Qur'an*, vol. 2, p. 13-14; Al-Hariri: *'Alam al-mu'jizat*, p. 219-228.

² Blachère: *Introduction au Coran*, p. 166-169. See also the note of Hamidullah in his translation: *Le Saint Coran*, p. XLIV-XLVII.

possible to eventually resolve the incoherence of the sense, by making a *rap-prochement* between the Arabic and Syriac words.

Luxenberg applies his theory to many Koranic terms which are problematic, arriving at a complete modification of the sense. Thus, in the verse 44/19:23-24 for example, it is the question of Mary who is accused of an illegitimate pregnancy and is chased away by her parents. Before delivering, she withdraws under a palm-tree and says: "I wish I had died before this, and became totally forgotten!" As soon as Jesus is born, the Koran makes him say (according to the usual translation): "Do not be sad, your Lord has made below you a stream." The phrase "*made below you a stream*" being the translation of "*tahtaki sariya*." Read in the light of the Syriac language, the passage gives the following meaning: "Your Lord has rendered your delivery legitimate."¹

One of the most sensational examples concerns the "*huris*" mentioned in the Koran (64/44:54; 76/52:20; 97/55:72 and 46/56:22). The "*huris*," generally understood to be the virgins destined to recompense the Muslim faithful in paradise, are none other than "white grapes," to go by the Syriac language. The Koran may have borrowed the image of heavenly delicacies from a hymn of the 4th century in Syriac by Saint Ephraim which speaks precisely about "white grapes."² As the Muslim commentators of the Koran knew neither Syriac nor Saint Ephraim, they fantasized about the Koranic verses.

Obviously, this manner of understanding the Koran does not please the Muslims. At the end of July 2003, an issue of the Newsweek magazine was banned in Pakistan and in Bangladesh due to an article entitled "Challenging the Koran" based on the work of Luxenberg.³ Not being competent in Syriac, we cannot pronounce ourselves on this work, but we consider that the reaction of the Muslims was exaggerated and demonstrated the difficulty they have to accept any innovative tentative to understand the Koran.

D) Structure of the Koran

The most widespread version of the Koran is the one of Cairo, prepared in 1923 under the patronage of King Fu'ad I of Egypt. It contains 114 chapters (*suras*). Each chapter has a title or two (chapters 113/9, 50/17, 43/35, 95/47, 2/68), or even more. The title is derived either from one of the first words of the chapter (23/53: Star; 97/55: Benefactor), or from a characteristic narration (72/14: Abraham; 44/19: Miriam), or from an episode considered to be significant (70/16: Bees; 85/29: Spider). These titles are not part of the revelation and do not figure among the early known Koranic manuscripts; they were added by the scribes in order to distinguish the chapters of the Koran from one another. Some, however, attribute the titles to Muhammad who may have fixed them.

The chapters are classified more or less in the decreasing order of their length, with the exception of the first. Some scholars hold that this order was established by an

¹ See Luxenberg, p. 102-121, as well as the interview <http://groups.yahoo.com/group/hugoye-list/message/859>.

² Luxenberg, p. 225-240.

³ http://www.rsf.org/print.php3?id_article=7670.

agreement (*ittifaq*) of the Muslims. It is claimed in this regard that 'Ali (d. 661) had a Koran, today lost, classified by chronological order. Others consider that Muhammad himself, under the decree (*tawqif*) of God, established the current order of the Koran. The Muslim tradition reports that during the lifetime of Muhammad his companions were putting into writing the revealed passages insofar as they could. During the last month of the Ramadan preceding the demise of Muhammad, the Angel Gabriel revised with Muhammad the entire Koran and established the final order of the verses and the chapters.¹

There is an agreement among Muslims that the order of the verses within the chapters was fixed by Muhammad under the decree (*tawqif*) of God. Yet, often the verses follow each other without any unity of subject. On the other hand, in 39 chapters, the verses belonging to different periods are intermingled.

All the chapters start with an invocation on God: *Bism Illah Al-Rahman Al-Rahim* (In the name of God, the all-merciful, the very-merciful), with the exception of chapter 9, which would indicate that, in the origin, this chapter and chapter 8 were one and continuous. The invocation is found only once inside the chapter (48/27:30), which indicates that this chapter was initially divided into two. Some consider that the invocation at the beginning of the chapter is not part of the revealed text. It is not taken into consideration in the counting of the verses by the Cairo edition. Muhammad would not recite it when reading the chapters one after the other.² The invocation in question assembles three names of the divinity: Allah, Rahman and Rahim. Al-Rahman was a divinity of southern-Arabia. Musaylamah, contender and adversary of Muhammad, murdered during the battle against Abu-Bakr (d. 634) in 632, claimed receiving revelations from this divinity. As for Al-Rahim, he was a divinity of northern-Arabia.³ The Koranic use of these two names jointly with the name of Allah may have been dictated by the will to unify the tribes of the north and those of the south, by associating their divinity to Allah. Verses 87/2:163 and 101/59:22 insist that it is a question of the same God: "Your God is one god. There is no god but him! The all-merciful, the very-merciful." Verse 50/17:110 adds: "Call on God, or call on the all-merciful. Whichever you call upon, he has the best names."

At the top of chapter 29 are found abbreviations called *fawatih al-suwar* or *al-huruf al-muqatta'ah*: ALM (chapters 87/2, 89/3, 85/29, 84/30, 57/31, 75/32), ALMR (chapter 96/13), ALMS (chapter 39/7), ALR (chapters 51/10, 52/11, 72/14, 54/15), HM (chapters 60/40, 61/41, 62/42, 63/43, 64/44, 65/45, 66/46), KHI'S (chapter 44/19), N (chapter 2/68), Q (chapter 34/50), S (chapter 38/38), TH (chapter 45/20), TS (chapter 48/27), TSM (chapter 47/26, 49/28), YS (chapter 41/36). Only chapters 87/2 and 89/3 belong to the Medinine period, whereas the others belong to the Makkan period, according to the classification proposed by the Cairo edition.⁴ The abbreviations have given rise to the many interpretations that are of-

¹ Sirri: *Al-rasm al-'Uthmani*, p. 13.

² Sfar: *Le Coran est-il authentique?* p. 78-79.

³ Al-Haddad: *Durus qur'aniyyah, Bay'at al-Qur'an al-kitabiyyah*, p. 121-125.

⁴ For more information about the abbreviations, see Blachère: *Introduction au Coran*, p. 144-149; Al-Hafni: *Mawsu'at al-Qur'an al-adhim*, vol. I, p. 37-40.

ten esoteric. Were they to be part of the revelation, they would have been fragments of phrases or of words pronounced by Muhammad in the state of ecstasy. These verses evoke this phenomenon:

Do not move your language herewith to hasten it. It is for us its gathering and its reading. Therefore, when we read it, follow its reading. Then it is for us its explanation (31/75:16-19).

Do not hurry with the Koran before its revelation is completed to you. Say: "My Lord! Increase my knowledge!" (45/20:114).

However, it can be doubted that the abbreviations belong to the time of Muhammad, since no one dared to ask him about their meaning. For this reason, it can be inferred that it was question of later additions aimed probably at providing points of reference for the classification of the Koranic passages, the letters of the alphabet thereby take on the value of figures, like in Syriac, Hebrew and Latin. It can be noted, however, that five chapters of the Koran have kept, as title, an abbreviation: chapter 45/20 (TaHa), 41/36 (YaSin), 38/38 (Sad), 34/50 (Qaf) and 2/68 (Nun), also called Al-Qalam).¹

E) Style of the Koran

For Muslims, the Koran is perfect in what concerns style. No person can excel it. Putting into question this belief constitutes death-deserving blasphemy. Nonetheless, we should highlight the characteristics of style which render difficult the reading of the Koran.

a) The lack of punctuation marks

The Koran is divided into 114 chapters. Each chapter was later divided into verses, the numbering being placed at the end of the verse and not at the beginning like in other sacred texts. The length of the verse varies a lot. It can comprise one or two words (97/55:1; 30/101:1 and 13/103:1) or several phrases (87/2:101, 196 and 282; the latter being the longest verse of the Koran). Verses associated with the beginning of the mission of Muhammad, today found at the end of the Koran, are pithy, short, offering clauses of identical rhythm. Later, the tendency was towards the stretching of the rhymed unit. The criteria of the division into verses depended especially on the assonance and the rhyme, but there is no unanimity concerning the division and the number of verses. Thus, the Cairo edition and the Tunisian one contain 6,236 verses, whereas a tradition going back to Ibn-'Abbas (d. v. 686) counts 6,616 verses. In the 1834 Arabic edition of Gustave Flügel (d. 1870), some verses of the Cairo edition have been divided or united. Blachère (d. 1973) and Hamidullah (d. 2002) provide, in their translations, the two numberings: the one of Flügel still in use in the West and that of Cairo edition used in this work.

Apart from the division of the verses, the Arabic version of the Koran, even the modern one, does not include punctuations marks (full-stop, coma, etc.), thus complicating the reading of the Koran, especially when the phrase is divided into two or more verses (113/9:1-2; 23/53:13-16), or on the contrary, when the verse comprises several phrases, as already indicated above. One of the reasons for which the

¹ Sfar: *Le Coran est-il authentique?* p. 68-69.

punctuation marks were not included was the uncertainty concerning the phrases. A verse can have different meanings, depending on the placement of the full-stop.¹

b) Interpolation

The problem of the lack of the punctuation marks is accentuated by the fact that the Koran contains many interpolations. Thus, within the same chapter, even within the same verse, there are found passages that are out of context. Consequently, the Koranic text gives the impression of being deconstructed and reconstructed.

An example of interpolation is provided by verse 87/2:102 which is particularly long with regard to the preceding or successive verses. Another example is found in verses 87/2:153-162 which have for theme encouragements addressed to the believers after a military defeat. Yet, in the middle of the development, verse 158 abruptly authorizes the rite of ambulation between Al-Safa and Al-Marwa, two stations particular to the cult of pilgrimage in Makka. Then, the successive verses take up again the previous theme. Interpolations can also be found within the same verse. Thus, verses 87/2:189, 92/4:164, 103/22:40 and 75/32:23 are composed of different elements not linked with one another. Similarly, the second part of verse 66/46:15 should have been attached rather to verse 48/27:19.²

Such problems render the reading of the Koran not that easy, especially since the Arabic text was produced afterwards, without any convenient page set-up, and yet Muslims strive to write it with the most beautiful calligraphy. In order to partially resolve this problem, Blachère displaces interpolated passages in his translation so that the reader can follow the text more easily. Muslims see in this kind of approach an indirect criticism of the Koranic text which is supposed to be perfect. Sa'id, a contemporary Muslim author, proposes such a procedure, specifying that this has to be done under the supervision and in agreement with higher religious authorities.³ The proposition has remained a pious wish.

c) Lack of systematization

The Koran does not present the subjects it deals with in a systematic manner. This poses a problem to occidental jurists who are used to codified norms. When they try to find out the position of the Koran on a particular subject, they have to refer to various dispersed verses, at times even contradictory and mixed up with passages with which they do not often have any direct relation. The contradiction of the verses had been resolved by Muslim jurists through the theory of abrogation; a posterior norm abrogates an anterior norm. This, however, necessitates the dating of the verses, not so easy a task and rather controversial, especially since certain verses abrogate others which are found in the posterior chapters of the collection of the Koran. We have presented at the end of the book an analytical table of the principal normative Koranic verses.

¹ Such is the case with the verse 3:7.

² Sfar: *Le Coran est-il authentique?* p. 47-55.

³ Sa'id: *Al-jam'*, p. 314-315.

d) Repetition

The same story or norm is reported in various chapters, either in abbreviated form or in details. For example, the story of Lot and the destruction of Sodom, inspired by the Bible (Gn 18:16-33 and 19:1-29), reappears in nine chapters of the Koran.¹ A similar phenomenon is found in the narration concerning the prophet Moses or the Arab prophet Shu'ayb. This demonstrates that the Koranic text had been the object of successive superposed editings.

Sometimes a verse is repeated literally in two different passages, without there being any relation between the repetition and the context of one of the two passages. Thus, verse 49/28:62 is repeated in verse 49/28:74, but the latter is out of context. Chapter 97/55 which contains 78 verses has the same phrase repeated 31 times and chapter 33/77 which contains 55 verses has the same phrase repeated 11 times.

F) Proposal for a classification

The larger part of the Koran was revealed before the departure of Muhammad in 622 from Makka to Medina where he founded a Muslim State. The other part was revealed thereafter, until his death in 632. The total number of chapters is 114, of which the longest is chapter 2 (286 verses) and the shortest is chapter 108 (3 verses). As already indicated above, the chapters are classified more or less in the decreasing order of their length, with the exception of the first one.

According to the Cairo edition, the chapters of the Makkan period are 86 in all and those of the Medinine period are 28. However, Medinine verses can also be found in 35 Makkan chapters. The edition indicates at the top of each chapter which period the chapter belongs to and the verses within it which belong to another period. It is necessary, however, to note that neither the Muslim authors nor their occidental counterparts have agreed about chronological classification of Koranic chapters and verses.² Yet, such a classification is essential for the understanding of the evolution of the Koranic thought and for distinguishing abrogated verses from the abrogating ones, a matter bearing significant juridical implications.³

The distinction between Makkan and Medinine verses and chapters is based on the oral tradition of the companions of Muhammad or their students, and also on certain basic criteria. Makkan verses often speak about belief in God, the Day of Judgment, the creation of man, the story of Adam and Eve, stories of prophets and preceding nations. As for the Medinine verses, they deal principally with juridical norms related to family law, penal law and holy war; they also speak about the "hypocrites" and debates with non-Muslims. Some also present differences of style. Makkan verses are often brief, pithy and rhymed. Medinine verses on the contrary are long and detailed. Makkan verses are addressed generally to "people" (*Ya ayyuha al-nas*, O! people) whereas the Medinine verses are addressed to the "be-

¹ See in particular, 39/7:80-84; 11:74-83; 54/15:57-77; 73/21:74; 47/26:160-174; 48/27:54-58; 85/29:31-35; 56/37:133-138; 37/54:33-39.

² Concerning the first and the last passages revealed, see Abu-Shahbah: *Al-madkhal*, p. 102-117.

³ See Blachère: *Introduction au Coran*, p. 240-263. For a comparison between the Muslim and the Orientalists classifications, see Al-Haddad: *Durus qur'aniyyah: Atwar al-da'awah al-qur'aniyyah*, p. 299-313.

lievers" (*Ya ayyuha al-ladhina amanu*, O! you believers). However, six Makkan verses also use the latter formula.¹

Blachère (d. 1973) made two French translations of the Koran. In the first one (Paris, 1949-50), he classified the chapters by chronological order, according to his own understanding. In the second one, he followed the canonical order of the chapters in the way accepted by Muslims, whilst including a typographical disposition, as we have seen above.

Khalaf-Allah (d. 1997), an Egyptian professor, was in favour of a Koran in Arabic that would classify the chapters in the chronological order, but without tempering with the order of the verses.² He points out that the current version of the Koran starts with the end and finishes with the beginning of the revelation, leading to confusion in the mind of the reader of the Koran. In response to those who wish to maintain the current use inherited from the ancestors, he quotes the Koran:

When it is said to them: "Come to what God descended and to the messenger," they say: "What we found at our fathers is sufficient for us." Even though their fathers do not know anything and are not guided? (112/5:104).

A source indicates that in 1968 an Iranian called Al-Mirza Baqir may have wanted to edit the Koran in Lebanon according to his own classification, but *Dar al-ifta'* (a Muslim office in charge of the *fatwa*) of Lebanon opposed the project.³ We shall see later that the Sudanese thinker Muhammad Mahmud Taha constructed his own theory on the basis of the distinction between Makkan and Medinine verses, considering that the latter should be treated as having been abrogated by the former. The theory won him a death penalty by hanging in 1985.

Due to the reticence of the Muslims to publish a chronological edition, we prepared a bilingual edition of the Koran, French - Arabic, strictly following the indications given by Cairo edition. Similar bilingual editions, English - Arabic, and Italian - Arabic, will be published soon. We also published an online Arabic edition of the Koran. These editions have references to variations, abrogations and Jewish and Christian writings.

We present here-below a summary table indicating the chronological order of the chapters according to the Azhar, Noldeke (d. 1930) and Blachère (d. 1973), as well as the usual order based on the 'Uthmanian Koran.

Chronological order according to			Usual order according to	
Al-Azhar	Noldeke	Blachère	'Uthman	Name, number of the verses and period of the chapter
5	48	46	1: الفاتحة	The opening - 7 verses Makkan
87	91	93	2: البقرة	The cow - 286 verses Medinine
89	97	99	3: آل عمران	The family of Imran - 200

¹ Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. I, p. 23.

² Khalaf-Allah: *Dirasat*, p. 245-257.

³ Al-Bundaq: *Al-mustashriqun*, p. 109-114.

92	100	102	4: النساء	verses Medinine The women - 176 verses Medinine
112	114	116	5: المائدة	The table - 120 verses Medinine
55	89	91	6: الأنعام	The cattle - 165 verses Makkan [except: 20, 23, 91, 93, 114, 141, 151-153]
39	87	89	7: الأعراف	The battlements - 206 verses Makkan [except: 163-170]
88	95	97	8: الأنفال	The spoils - 75 verses Medinine
113	113	115	9: التوبة	The repentance - 129 verses Medinine
51	84	86	10: يونس	Jonah - 109 verses Makkan [except: 40, 94-96]
52	75	77	11: هود	Hud - 123 verses Makkan [except: 12, 17, 114]
53	77	79	12: يوسف	Joseph - 111 verses Makkan [except: 1-3, 7]
96	90	92	13: الرعد	The thunder - 43 verses Medinine
72	76	78	14: إبراهيم	Abraham - 52 verses Makkan [except: 28-29]
54	57	59	15: الحجر	Al-Hijr - 99 verses Makkan [except: 87]
70	73	75	16: النحل	The bees - 128 verses Makkan [except: 126-128]
50	67	74	17: الإسراء	The night journey - 111 verses Makkan [except: 26, 32-33, 57, 73-80]
69	69	70	18: الكهف	The cave - 110 verses Makkan [except: 28, 83-101]
44	58	60	19: مريم	Mary - 98 verses Makkan [except: 58, 71]
45	55	57	20: طه	Taha - 135 verses Makkan [except: 130-131]
73	65	67	21: الأنبياء	The prophets - 112 verses Makkan
103	107	109	22: الحج	The pilgrimage - 78 verses Medinine
74	64	66	23: المؤمنون	The believers - 118 verses Makkan
102	105	107	24: النور	The light - 64 verses Medinine
42	66	68	25: الفرقان	The salvation - 77 verses

47	56	58	الشعراء: 26	Makkan [except: 68-70] The poets - 227 verses Makkan [except: 197, 224-227]
48	68	69	النمل: 27	The ants - 93 verses Makkan
49	79	81	القصص: 28	The story - 88 verses Makkan [except: 52-55]
85	81	83	العنكبوت: 29	The spider - 69 verses Makkan [except: 1-11]
84	74	76	الروم: 30	The Romans - 60 verses Makkan [except: 17]
57	82	84	لقمان: 31	Luqman - 34 verses Makkan [except: 27-29]
75	70	71	السجدة: 32	The prostration - 30 verses Makkan [except: 16-20]
90	103	105	الأحزاب: 33	The confederates - 73 verses Medinine
58	85	87	سبا: 34	Saba - 54 verses Makkan [except: 6]
43	86	88	فاطر: 35	The creator - 45 verses Makkan
41	60	62	يس: 36	Yasin - 83 verses – Makkan [except: 45]
56	50	52	الصفافات: 37	The ranked - 182 verses Makkan
38	59	61	ص: 38	Sad - 88 verses Makkan
59	80	82	الزمر: 39	The groups - 75 verses – Makkan [except: 52-54]
60	78	80	غافر: 40	The forgiver - 85 verses Makkan [except: 56-57]
61	71	72	فصلت: 41	The expounded signs - 54 verses Makkan
62	82	85	الشورى: 42	The consultation - 53 verses Makkan [except: 23-25, 27]
63	61	63	الزخرف: 43	The ornaments - 89 verses Makkan [except: 54]
64	53	55	الدخان: 44	The smoke - 59 verses Makkan
65	72	73	الجناثية: 45	The kneeling - 37 verses Makkan [except: 4]
66	88	90	الاحقاف: 46	Al-Ahqaf - 35 verses – Makkan [except: 10, 15, 35]
95	96	98	محمد: 47	Muhammad - 38 verses Medinine
111	108	110	الفتح: 48	The conquest - 29 verses

106	112	114	الحجرات: 49	Medinine The clusters - 18 verses Medinine
34	54	56	ق: 50	Qaf - 45 verses Makkan [except: 38]
67	39	49	الذاريات: 51	The winnowers - 60 verses Makkan
76	40	22	الطور: 52	The mount - 49 verses Makkan
23	28	30	النجم: 53	The star - 62 verses Makkan [except: 32]
37	49	50	القمر: 54	The moon - 55 verses Makkan [except: 44-46]
97	43	28	الرحمن: 55	The all-merciful - 78 verses Medinine
46	41	23	الواقعة: 56	The event - 96 verses Makkan [except: 81-82]
94	99	101	الحديد: 57	The iron - 29 verses Medinine
105	106	108	المجادلة: 58	The dispute- 22 verses Medinine
101	102	104	الحشر: 59	The gathering - 24 verses Medinine
91	110	112	المتحنة: 60	The tested woman - 13 verses Medinine
109	98	100	الصف: 61	The rank - 14 verses Medinine
110	94	96	الجمعة: 62	Friday - 11 verses Medinine
104	104	106	المنافقون: 63	The hypocrites - 11 verses Medinine
108	93	95	التغابن: 64	The mutual fraud - 18 verses Medinine
99	101	103	الطلاق: 65	The repudiation - 12 verses Medinine
107	109	111	التحريم: 66	The prohibition - 12 verses Medinine
77	63	65	الملك: 67	The kingdom - 30 verses Makkan
2	18	51	القلم: 68	The pen - 52 verses Makkan [except: 17-33, 48-52]
78	24	24	الحاقة: 69	The reality - 52 verses Makkan
79	42	33	المعارج: 70	The ascents - 44 verses Makkan
71	51	53	نوح: 71	Noah - 28 verses Makkan
40	62	64	الجن: 72	The djinns - 28 verses Makkan
3	23	34	المزمل: 73	The enwrapped - 20 verses

4	2	2, 36	74: المدثر	Makkan [except: 10-11, 20] The shrouded - 56 verses Makkan
31	36	27	75: القيامة	The resurrection - 40 verses Makkan
98	52	34 bis	76: الإنسان	The human - 31 verses Medinine
33	32	25	77: المرسلات	The emissaries - 50 verses Makkan [except: 48]
80	33	26	78: النبأ	The news - 40 verses Makkan
81	31	20	79: النازعات	The stripping - 46 verses Makkan
24	17	17	80: عبس	He frowned - 42 verses Makkan
7	27	18	81: التكويد	The rolling up - 29 verses Makkan
82	26	15	82: الانفطار	The splitting - 19 verses Makkan
86	37	35	83: المطففين	The defrauders - 36 verses Makkan
83	29	19	84: الانشقاق	The fissuration - 25 verses Makkan
27	22	43	85: البروج	The constellations - 22 verses Makkan
36	15	9	86: الطارق	The night-star - 17 verses Makkan
8	19	16	87: الأعلى	The most high - 19 verses Makkan
68	34	21	88: الغاشية	The enveloper - 26 verses Makkan
10	35	42	89: الفجر	The dawn - 30 verses Makkan
35	11	40	90: البلد	The earth - 20 verses Makkan
26	16	7	91: الشمس	The sun - 15 verses Makkan
9	10	14	92: الليل	The night - 21 verses Makkan
11	13	4	93: الضحى	The forenoon - 11 verses Makkan
12	12	5	94: الشرح	The expansion - 8 verses Makkan
28	20	10	95: التين	The fig - 8 verses Makkan
1	1	1, 32	96: العلق	The adherences - 19 verses Makkan
25	14	29	97: القدر	The predetermination - 5 verses Makkan
100	92	94	98: البينة	The proof - 8 verses Medinine
93	25	11	99: الزلزلة	The shaking - 8 verses

14	30	13	100: العاديات	Medinine The coursers - 11 verses Makkan
30	24	12	101: القارعة	The cataclysm - 11 verses Makkan
16	8	31	102: التكاثر	The multiplication - 8 verses Makkan
13	21	6	103: العصر	The epoch - 3 verses Makkan
32	6	39	104: الهمزة	The slanderer - 9 verses Makkan
19	9	41	105: الفيل	The elephant - 5 verses Makkan
29	4	3	106: قريش	Quraysh - 4 verses Makkan
17	3	8	107: الماعون	The refuge - 7 verses Makkan [except: 4-7]
15	5	38	108: الكوثر	The abundance - 3 verses Makkan
18	45	45	109: الكافرون	The disbelievers - 6 verses Makkan
114	111	113	110: النصر	The succor - 3 verses Medinine
6	3	37	111: المسد	The fibers - 5 verses Makkan
22	44	44	112: الإخلاص	The purity - 4 verses Makkan
20	46	47	113: الفلق	The fissure - 5 verses Makkan
21	47	48	114: الناس	The humans - 6 verses Makkan

G) Translation of the Koran

The Koran was revealed in Arabic. Much of the content as well as the packaging were revealed. Reciting the Koran as a commendable religious act can only be done in Arabic. This is why the Koran is said to be *lafdh wa ma'na* (pronunciation and meaning).

With the expansion of the Muslim empire to many countries which did not understand Arabic, the question of the translation of the Koran was posed. Several translations into national languages appeared already during the 9th century. Only Abu-Hanifah (d. 767) seems to have authorized the ritual recitation of the Koran in other languages for people not prone to rouse religious dissidence, even if they could understand Arabic. He may have considered that what mattered in the recitation was the meaning. However, he had to go back on his decision.¹ He used to quote in this regard: "Read then of the Koran that which is easy" (3/73:20) and "We made the Koran easy for remembrance. Is there any to remember? (37/54:17, terms repeated in the verses 37/54:22; 37/54:32; 37/54:40). He used to quote also the narration of Muhammad according to which "the Koran was revealed in seven letters."

¹ Hasab-Allah, p. 17.

Although the Koran had been revealed in the language of the Quraysh, this narration allowed Arab tribes to recite it according to their respective dialects.¹

In the West, the Koran was translated several times into several languages; the first being the Latin one of 1143, established under the urge of Peter the Venerable, abbot of Cluny, and addressed to Saint Bernard. It was republished in Basel in 1543 and it served as the basis for other translations into European languages. Many translations have been made since.²

A quarrel exploded in 1925 in Egypt concerning the appearance of the translation of the Koran made by Muhammad 'Ali of the Qadiani (Ahmadiyyah) sect in Pakistan. Al-Azhar asked the customs authorities to have it burnt. The incident took place within a particular political climate; Turkey had just abolished the Caliphate and was planning to introduce an official translation of the Koran in the Turkish language, already in use during prayers. In 1936, Shaykh Mustafa Al-Maraghi, director of Al-Azhar, requested the President of the Egyptian Council of Ministers to make an official translation in English. In both cases, several opinions were expressed, for or against.³ Although the idea of translating the Koran does no longer cause passionate reactions today and finds, on the contrary, favourable acceptance, the realization of an official translation is yet to see its day. Certain Muslim translators try to get some support for their translation from Al-Azhar, a kind of *Nihil obstat*. Al-Azhar demands in that case to have the translation accompanied by the Arab version.

Even the best-meaning non-Muslim translators and those most in favour of the Muslims are not spared the criticisms of the Muslims. Such was the case for Jacques Berque (d. 1995).⁴ By this fact, Muslim authors who admit the possibility of translating the Koran into foreign languages demand a translation established by official Muslim organs which could be finally put at the disposal of Muslims who do not understand Arabic, a more or less reliable version, instead of leaving them at the mercy of the current translations, often done by Christians.

It is interesting to note in this regard that the French translation revised by Subhi Al-Salih (d. 1986) and approved by Al-Azhar was done by Denise Masson (d. 1994), a Catholic nun. Instead of giving the first name and the surname of the translator, the work mentions only the first letter of the forename and the surname. Furthermore, all the footnotes referring to the Old and New Testament have been cancelled.

Whatever the religion of the translator, the translation of the Koran remains a difficult task, because of objective reasons. Apart from the fact that there are different

¹ Rishi: *Al-madhab al-hanafī*, p. 256-259.

² See the list of these translations in Hamidullah: *Le Saint Coran*, p. LX-LLII.

³ For more information on the quarrels, see Muhanna: *Dirasah*, p. 13-80; Al-Bundaq: *Al-mustashriqun*, p. 72-84.

⁴ *Le Coran*, trans. of Jacques Berque. See a critique of this translation in 'Abd-al-'Aziz: *Tarjamat al-Qur'an ila ayn?* The author of the critique made his own translation of the Koran in French (*Le Coran*, trans. by Zeinab Abdelaziz), preceded by a criticism against Jacques Berque. See another criticism against Chouraqui and Berque in *Al-nadwah al-duwaliyyah hawl tarjamat ma'ani al-Qur'an*, p. 112-138.

readings of the Koran,¹ many Arabic terms are the object of controversy among the major Muslim scholars themselves. Moreover, it is practically impossible to translate certain pithy passages about whose meaning commentators do not agree. As a result, every translation is necessarily an option in favour of one reading or interpretation, to the detriment of the others. The Azhar Committee considers, however, that translations of the Koran should be principally based on the *reading of Hafs*, the most widespread, and depart from it only in case of necessity.²

Certainly, translations do not transmit the subtleties and the wholeness of the Arabic original. It is necessary nonetheless to note that the language of the Koran is not always accessible to people whose mother language is Arabic but do not have an in-depth Islamological formation. Although charmed by the rhythm and by certain phrases of eloquence, the average Arab reader captures only summarily the meaning of the Koran. Such is the case today, as it was in the past during the first centuries of Islam for the companions of the Prophet.³

H) Koran in Latin characters

It was envisaged to write the Koran with the Latin alphabet in order to render it accessible to those not familiar with the Arabic alphabet. The tentative was largely fought against in Muslim milieus.⁴ In any case, whatever the method used, it is practically impossible to turn the Arabic pronunciation into Latin alphabet. Moreover, what would be the interest of reading the Koranic Arabic text with Latin alphabet? Were it simply question of the obstacle of the alphabet, it could easily be learnt within a short time. What counts is understanding what is read.

The tentative of romanization was proposed for the Arabic language and was rejected and yet it was accepted for Turkish language in 1928, a matter that has rendered difficult the access for the young Turks to anterior literature written with the Arabic alphabet.

I) Publication, purchase, touching and recitation of the Koran

The editing of the Koran is the competence of official organization in Muslim countries, in order to avoid alterations. Some Arab authors mention the existence of falsified editions of the Koran made by Israel and distributed in black Africa.⁵

The Koran is a sacred book and sacred objects cannot be commercialized. Hence, one does not ask the bookseller for the price of the Koran, but for the corresponding gift to be offered in exchange (*hibatu-hu*). The bookseller offers a copy and receives in exchange a certain sum of money of his own determination. Such is the practice at least in the Arab countries of the Middle East. However, this does not seem to be the case in Yemen.

The sacred character of the Koran renders obligatory certain rules with regard to reading, touching and the destruction of the Koran.¹

¹ See Part I, chapter I.I.3.B.

² *Al-nadwah al-duwaliyyah hawl tarjamat ma'ani al-Qur'an*, p. 26-34, 158.

³ Al-Nimr: *'Ilm*, p. 37.

⁴ See "Kitabat al-mushaf bil-latiniyyah," in *Majallat al-buhuth al-islamiyyah*, vol. 10, 1404 h., p. 11-59.

⁵ Sa'id: *Al-jam'*, p. 372-373.

Thus, it is necessary that the one who reads the Koran first performs his ablutions. According to the majority of the jurists, a person who is in the state of impurity (*janb*) or menstruation (*haydh*) does not have the right to read the Koran, by virtue of the verses 46/56:76-79: "It is a great oath, if you were knowing! It is an honourable Koran, in a preserved book, that only the purified can touch." One should be properly dressed, seated in a clean place, spiritually present and start the reading with the phrase: "I seek refuge with God against the stoned satan."² One should not interrupt the reading by speaking with other people so as not to intermingle human words with God's words. Similarly, one should not laugh or joke.

It is illicit to use the Koran as a means of begging or winning one's bread. It is, however, a custom in certain countries to hire the services of a blind reader who chants the Koran during ceremonies accompanying the funerals. Similarly, it is permissible to teach the Koran for a salary.

It is not allowed to put the Koran on the ground, to put other things on top of it or to lean on it. It must be on top of a pile of books. It is not allowed to cast down on the ground the torn pages; they must either be washed to remove the writings or burnt, or buried.

The Koran is recited from the top of the minarets, on the radio or on television, and in public gatherings. Many websites propose the Koran recited by famous Shaykhs endowed with beautiful voices, *tartil*³ or *tilawa*.⁴ Even where the recitation is similar to chants, it is prohibited to use the verses of the Koran in songs. Marcel Khalifah (b. 1950), a committed Lebanese Christian singer raised a tempest for having chanted a poem of Mahmud Darwish containing the Koranic phrase of the story of Joseph: "O my father! I saw [in a vision], eleven stars, the sun and the moon. I saw them prostrate before me" (53/12:4). He was accused of ridiculing the religious convictions of the Muslims.⁵ He was then acquitted by the tribunal the 15 December 1999.

II. Koran as the source of law

1) The obligatory character of the Koran

Zaydan, a Muslim professor, wrote:

There is no divergence among Muslims that the Koran is obligatory for all (*hujjatun 'ala al-jami'*), and that it constitutes the first source of Islamic law. This follows from the fact that it originates from God. The proof that it originates

¹ Da'ud: *'Ulum*, p. 102-114; 'Umar: *Al-Qur'an*, p. 168-183.

² The Koran says: "When you read the Koran, seek refuge with God against the stoned satan" (70/16:98).

³ The terms are found in the following verses: 42/25:32; 3/73:4.

⁴ The term is found in the following verses: 87/2:113; 87/2:121; 87/2:129; 87/2:151; 3:113; 3:164; 4:127; 112/5:1; 11:17; 50/17:107; 22:30; 22:72; 49/28:53; 49/28:59; 85/29:51; 90/33:34; 43/35:29; 59/39:71; 110/62:2; 99/65:11; 2/68:30; 9/92:2.

⁵ See the opinion of Muhammad Salim Al-'Awwa in favour of Marcel Khalifah in <http://www.islamonline.net/iol-arabic/dowalia/fan-4/alqawel.asp>. See also <http://www.islamonline.net/iol-arabic/dowalia/qpolitic-1/qpolitic8.asp>.

from God is its inimitability. If we admit that it originates from God – because of its inimitability – everyone becomes obliged to follow it.¹

Contemporary authors who call for the return to Islamic law turn to many Koranic verses which demonstrate the obligation for the believer to submit himself to the law. We quote here some verses extracted from a contemporary piece of work.² Such books are found in hundreds in the bookshops of the Arab world.

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

Have you not seen those who assert that they believed in what was descended unto you and what was descended before you? They want to go for judgment to the idols, while they were commanded to disbelieve therein. Satan wants to misguide them in a far misguidance (92/4:60).

We did not send any messenger but that he be obeyed, with God's permission (92/4:64).

We descended to you the book with the truth, confirming what is before it of the book and predominant on it. Therefore judge between them by what God descended and do not follow their desires, far from the truth that came to you. To each of you we made legislation and conduct (112/5:48).

A scripture that we revealed to you, in order to lead the people out of darkness into the light - in accordance with the will of their Lord - to the path of the Almighty, the Praiseworthy (72/14:1).

The saying of the believers, when they are called to God and his messenger so that he may judge between them, is only to say: "We heard and obeyed." Those are the successful (102/24:51).

It must be highlighted here that the Koran incites the believers not to over-solicit revelation in order to resolve their own problems and to rely on themselves as much as possible in their earthly life:

O you who believed! Do not ask about things that if they are shown to you would harm you. If you ask about them, when the Koran is descended, they will be shown to you. God pardoned [you] for them. God is forgiver, magnanimous. A people before you asked about them, and then disbelieved therein (112/5:101-102).

Muhammad said in the same sense:

The most guilty among Muslims is the one asks questions about things which were not forbidden and became so after his questions.

God has imposed the duties which you must respect; he fixed the limits which you should not overstep; established prohibitions which you should not violate;

¹ Zaydan: *Al-wajiz*, p. 152.

² Yasin: *Muqaddimah*.

and he has been silent over certain things out of pity for you, without forgetting about them, you should not inquire after them.¹

Muhammad was asked whether it was obligatory to perform the pilgrimage each year. He reprimanded the inquirer and forbade asking questions about futile matters: "Do not ask me questions about things I neglected. Some people before you went astray because of asking too many questions."

The Koran goes as far as asking the believers to offer charity to the poor before coming to question the Prophet, so that they should cease importuning him:

O you who believed! When you hold confidence with the messenger, precede your confidence by an alms. That is better for you and purer. But if you do not find, God is forgiver, very-merciful! (105/58:12).

The reticence of Muhammad was even greater over questions concerning the domain of metaphysics. Thus, he advised his adepts: "When destiny is mentioned, hold yourselves back." Umar (d. 644) beat a man who wanted to know the meaning of obscure words such as *al-mursalat* and *al-'asifat* in the verses 33/77:1-2.² He also struck down someone who was asking him questions concerning equivocal verses; he banished him from Medina and forbade people to sit near him in order to avoid controversies and perversion.

Evoking verses 87/2:67-69, Ibn-'Abbas (d. v. 686) mentioned that Moses had prescribed the sacrifice of a cow. The Jews then asked a lot of questions concerning the qualities of the cow, by consequence God rendered the task even more difficult, although he could have been satisfied with whatever cow. In spite of the will to leave the individuals with their liberty, once the revelation had taken place, it became obligatory and it was not possible any more to go back or to pretend that it did not exist. The obligation imposes itself on all and not just on those who provoked the revelation.

2) Authentication of the Koran

In order for the law to be obligatory, it must be authenticated as originating from an authority invested with the presupposed competence to promulgate it and it must be in conformity with the original version, without any alteration.

The same goes for the Koran and other religious texts. Jurists advance two conditions for the texts to be unobjectionable for the Muslims:

- A) It must be proven that they truly originate from God (*thubut nisbah*).
- B) It must be proven that the texts at our disposal had been transmitted without interruption and without alteration (*thubut al-tawatur*).³

A) Authentication of the divine source and of the texts of other religions

According to Muslims, if a messenger claims that he comes from God, he must prove it by performing some miracles. To designate the miracles, the Koran some-

¹ Al-Khudari: *Tarikh*, p. 17-19.

² For more information on this, see Al-Nimr: *Ilm*, p. 54-67.

³ Al-Hakim: *Al-usul*, p. 100.

times uses the qualifying terms: "an incontestable authority, a clear proof" (*sultan mubin*).¹

Pharaoh asked Moses to perform a miracle, before any discussion, to prove that he was sent by God:

Moses said: "O Pharaoh! I am a messenger from the Lord of the world. I must only say about God the truth. I came to you with a proof from your Lord. Send with me the children of Israel." [Pharaoh] said: "If you came with a sign, then bring it, if you are of the truthful!" [Moses] threw his staff, and it was a manifest snake. He pulled out his hand, and it was white for the onlookers (39/7:104-108).

We sent Moses, with our signs and [an argument of] a manifest authority, to Pharaoh and his chiefs. But they followed the order of Pharaoh, although the order of Pharaoh was not guided (52/11:96-97).

Similarly, according to the Koran, Jesus had to perform miracles for the Jews as a proof that he was sent by God:

and [he will be] a messenger to the children of Israel: "I came to you with a sign from your Lord. For you, I create from clay as the figure of a bird, then I blow in it and, with God's permission, it will become a bird. I heal the blind and the leper, and I revive the deads, with God's permission. I inform you of what you eat and of what you store in your houses. Therein is a sign for you, if you were believers! To confirm what is before me of the Torah, and to permit you a part of what was prohibited to you. I came to you with a sign from your Lord. Fear God and obey me (89/3:49-50).

Although Muslims believe that Moses and Jesus did indeed receive a revelation from God, a revelation whose origin was proved by the miracles, they consider that the text embodying the revelation has been altered. For this reason, Muslim authors rarely refer to Jewish and Christian sacred books.²

B) Authentication of the divine source of the Koran

The question of the attribution of the Koran to God is outrightly dismissed by a rational person for whom every text is by force a human product; all springs from the earth and nothing falls from heaven. However, for the Muslim, the attribution of the Koran to God is an essential aspect of his faith, denying it exposes him to death condemnation. On what do the Muslims base themselves to affirm that the Koran comes from God?

a) No miracle by Muhammad

The entourage of Muhammad used to ask him with insistence to authenticate his message by miracles, as did the previous prophets:

¹ The term is found in the following verses: 11:96; 72/14:10; 74/23:45; 48/27:21; 56/37:156; 60/40:23; 64/44:19; 67/51:38; 76/52:38.

² See Part II, chapter V.

They swore by God in their strongest oaths that if a sign came to them they would believe in it. Say: "The signs are only with God." But what will make you perceive that even if it came, they would not believe? (55/6:109).

When a sign comes to them, they say: "We will not believe until we are given the like of what was given to Messengers of God." God knows best where he puts his message. Belittlement and severe punishment from God will touch those who committed the crime for what they were plotting (55/6:124).

They say: "If only a sign was descended to him from his Lord!" Say: "The secret belongs only to God. So wait, I am with you from the waiting" (51/10:20).¹

Yet, Muhammad did not provide any miracle. The Koran explains the reason:

Not a sign from their Lord's signs comes to them, without they were disregardful of it (55/6:4; see also 41/36:46).

Nothing prevented us from sending the signs, except that the first belied them. We gave Tamud the she-camel as a visible [sign], but they oppressed her. We do not send the signs save to frighten (50/17:59).

We have cited for the humans, in this Koran, of every example. Even though you come to them with a sign, those who disbelieved will say: "You are only falsifiers" (84/30:58).

In spite of the affirmation of the Koran that Muhammad did not perform any miracle, Muslim authors do not hesitate to elaborate and invent many miracles² by him which have been put into question by contemporary Muslim authors.³ Among such miracles can be found:

- The splitting of the moon by Muhammad, a miracle recorded by the Koran: "The hour approached and the moon fissured" (37/54:1). Al-Haddad considers that the verse concerns the final judgment, and therefore not a miracle that may have occurred during the time of Muhammad.⁴
- The nocturne journey of Muhammad (*isra'* and *mi'raj*), a miracle recorded by the Koran: "Exalted is he who made his servant travel by night from the forbidden sanctuary to the farthest sanctuary which we had blessed around, so that we may show him of our signs. He is the hearer, the seer" (50/17:1). Verses 23/53:3-18 also refer to the same event. Al-Haddad remarks that the miracle took place at night, and therefore no one was witness.⁵
- The cooling of the temper of Muhammad, a miracle deduced from the Koran: "Did we not open for you your chest? Did we not remove from you your burden

¹ See also verses 96/13:7; 96/13:27; 20:133; 73/21:5; 85/29:50.

² See for example a selection of 35 miracles reported by Al-Ghazali (d. 1111), *Ihya' 'ulum al-din*, vol. 2, p. 383-387. Some of these miracles have been taken up again by contemporary authors. See, for example, Jalhum and Hammad: *Mu'jizat al-rasul*.

³ For more information about these authors, see Al-Haddad: *Durus qur'aniyyah: Mu'jizat al-Qur'an*, p. 87-94.

⁴ Al-Haddad: *Durus qur'aniyyah: Mu'jizat al-Qur'an*, p. 47 and 109-110.

⁵ Concerning this miracle, see Al-Haddad: *Durus qur'aniyyah: Mu'jizat al-Qur'an*, p. 47 and 97-104.

which broke your back? (12/94:1-3). Al-Haddad responds that the expression "open for you your chest" simply signifies the consolation of Muhammad.¹

b) Koran a miracle in itself

Muslim authors, classic as well as contemporary, consider that the miracle which proves the divine origin of the Koran is its inimitability. This is what is called *al-i'jaz*. The Arabic term is derived from the verb *'ajiza* (being incapable) from which is also derived the term *mu'jizah* (miracle). It indicates the incapacity to produce a text similar to the Koran.

In fact, the Koran gradually challenges its opponents. It starts by asking them to present a similar book:

Say: "If the humans and the djinns gathered to bring a Koran like this, they could not come with its like, even if they were to each other assistants" (50/17:88).

Then, it challenges them to produce ten chapters:

Or do they say: "He forged it"? Say: "Then bring ten forged chapters like this and call on whom you can besides God, if you were truthful" (52/11:13).

Then, it challenges them to produce only one chapter:

Or do they say: "He forged it"? Say: "Then bring a chapter like this and call on whom you can besides God, if you were truthful" (51/10:38).

If you are in suspicion about what we descended to our servant, bring a similar chapter and call your witnesses besides God, if you were truthful. So if you do not do, and you will never do [it], fear the fire whose fuel is humans and stones, which is prepared for the disbelievers (87/2:23-24).

Finally, it challenges them to present a single writing:

Or do they say: "He has forged it?" Rather they do not believe. Then let them bring a similar narration if they were truthful (76/52:33-34).

Evoking this challenge, Khallaf, a contemporary author, writes:

The Prophet launched the challenge when he declared himself God's Messenger, presenting for proof the Koran which had been revealed to him by God and which he used to recite. To his detractors, he said: if you doubt the divine origin of this text, if you believe that it is the work of human hands, then produce a similar text, or just ten chapters or even a single one! He defied them with a provocative tone. He used vexing and sarcastic expressions which incite to act and fight... There was no obstacle impeding them from taking on the challenge. Indeed, the Koran was written in Arabic, its vocabulary and its style are therefore Arabic... They could not do it; not due to lack of will or motivation, but because of incapacity. If only the detractors of the Koran had succeeded in imitating it, they would have saved the honour of their gods, reducing to silence those who had scorned them and they would have avoided war. However, instead of vying with the Koran, they conspired against the Prophet. Was this not

¹ Concerning this miracle, see Al-Haddad: *Durus qur'aniyyah: Mu'jizat al-Qur'an*, p. 95-97. The expression "cool your temper" is found in the verses 6:125, 20:25 and 59/39:22.

the proof of their incapacity and their capitulation to the divine and inimitable character of the Koran? They thus acknowledged that it was beyond human means and that its author was indeed God.¹

In what consists this challenge? Is it a question of producing an equivalent text on the linguistic level, as the above-mentioned quotation seems to indicate? The Koran does not say so. If such were the case, some would object against the claim that the language of the Koran could constitute a challenge to the Arabs themselves who used to speak it, but rather to the non-Arabs. To which it could be responded that if the Arabs, in spite of their eloquence, could not meet the Koranic challenge, more so the non-Arabs, even if they learnt Arabic.²

Muslim authors amplify the elements constituting this challenge infinitely. Hasab-Allah writes:

The miraculous character of the Koran originates from the eloquence of its terms and its style, its lightness on the tongue, its agreeable tonality for the ear, its seizure of the hearts, the information concerning what is unknown in the past or in future, the superior and virtuous morality which it contains, its just and complete law apt to govern all the people, in all places and at all times, and then the lack of internal contradictions: "Do they not meditate on the Koran? Had it been from other than God, they would have found therein much divergence!" (92/4:82).

The Koran assembles all such qualities in spite of the fact that the one who reported them was a poor man, in fact an orphan brought up by polytheists, without ever following a master and without ever having written a word. God says: "We know that they say: "It is only a human who teaches him." The language of the one they refer to is foreign, and this is a manifest Arabic language" (70/16:103). God says also: "Likewise we descended to you the book. Those to whom we gave the book believe therein. And of those also some believe therein. None denies our signs except the unbelievers. You were not reciting any book before it, nor were you writing it down by your right hand. Otherwise, the falsifiers would have suspected" (85/29:47-48). We must add to these elements the living proof that individuals and groups guided by the directives and the norms of the Koran have experienced progress and constitute an exemplary nation for which there has not been the equivalent in history.³

Khallaf writes:

Specialists agree about the fact that the inimitable character of the Koran is multifactorial. Men are incapable of producing any text similar to the Koran as much from the point of view of vocabulary as the meaning and the spiritual value. Its superiority affirms itself in various ways. In addition, it is well known that the human spirit has not yet penetrated all the secrets of the miraculous aspect of the Koranic text. The secrets are progressively divulged as the believers study the Koran and as the scientists discover the laws which govern the uni-

¹ Hallaf: *Les fondements*, p. 36-38. In the same line, see Hasab-Allah, p. 18-19.

² Hasab-Allah, p. 20.

³ *Ibid.*, p. 19.

verse and marvels of living beings. Yes, each discovery confirms the divine character of the Koran.¹

Mustafa Mahmud writes concerning his return to faith:

I read the Koran. The melody and the rhythm of its language surprised my ear. My spirit was marvelled by its content. Be it to respond to questions concerning politics, ethics, legislation, cosmos, life, soul or society, the Koran always has the last word, although it was revealed more than 1300 years ago... It agrees with all the most recent sciences, although it reached us by the intermediary of an illiterate Bedouin who lived among a backward people and away from the lights of civilizations. I read the life of this man, what he did... and I said to myself: yes, he is a prophet! It is impossible for it to be otherwise!²

The political world is not exempt of such extrapolations. Sadat affirmed:

Islam is not just about devotions, pilgrimage rituals, moral homilies, mechanical reading of the Book of God. No. Our Koran is a complete encyclopaedia which has neglected no aspect of life, thought, politics, society, cosmic secrets, mysteries of the souls, transactions, family law, without providing its opinion. The prodigious and miraculous aspect of the Koranic legislation is that it is suitable for every era.³

Sadat does nothing other than repeating what the Koran says about itself:

The falsehood cannot come to it from before it nor from behind it. A descent from a wise, a laudable (61/41:42).

We did not neglect anything in the book (55/6:38).

We descended on you the book, as manifest [explanation] of everything (70/16:89).

It can be retained from what precedes that proof of the divine origin of the message of Muhammad is based principally on four elements: the perfection of the text, knowledge of the past and prediction of the future, conformity with science and the illiteracy of Muhammad. These arguments are taught in faculties of law and reappear constantly in the discussions with the Muslims. It is important to say a word about them.

c) Perfection of the text

The argument comprises different elements: language, style, absence of internal contradiction, coherence of the enounced ideas, etc. We have already quoted excerpts of Hasab-Allah and Khallaf about the question. We quote two other passages of Khallaf:

The Koranic text is composed of six thousand verses. It comprises a variety of expressions and style. It deals with various subjects in the cultural, moral and juridical domains. It contains all at once cosmology, social ethics and metaphysics. Notwithstanding, the overall expression is always of constant quality, from

¹ *Ibid.*, p. 39.

² Mahmoud: *Dialogue avec un ami athée*, p. 217.

³ Al-Ahram, 1.6.1976, p. 6.

one verse to another, the style is true to itself. The terms are all pertinent and precise. The level of rhetoric is the same throughout the text. The expression corresponds perfectly to the described situation or the given prescription. Each word is in its right place. Neither its content suffered any internal contradiction nor its prescriptions any inconsistency. Its objectives all go in the same direction, its principles and its precepts affirm themselves concomitantly. Were it the work of human beings – individuals or groups – it would have borne contradictions in its expressions and in its content.¹

There is not in the Koran any term which could shock the ear or which would be incompatible with the preceding or subsequent terms. Its words are part of a coherent and harmonious entity and its various expressions are perfectly convenient for the situations they describe; it is the perfect model of the art of discourse.²

The argument of the perfection of the Koranic text is a delicate subject. We have largely treated the question above.³ It demonstrates the Muslims' incapacity to objectively read the Koran, either because they cannot do it due to the fatal consequences of such a reading or because their mind is clouded with the apologetic discourse, so many times repeated for the past fourteen centuries.

d) Knowledge of the past and prediction of the future

Khallaf writes:

The Koran narrates... the history of people who disappeared since antiquity and who have left any trace. It is a supplementary proof that it originates from God, who alone knows the past, the present and the future.

He quotes the following Koranic verse:

That is from the news of the secret that we reveal you. Neither you nor your people knew it before this (52/11:49).⁴

Besides the knowledge of the past, the Koran can also predict the future. Two examples are generally quoted in favour of this. The first concerns the victory of the Byzantines over the Persians. The Koran says:

The Romans have been defeated, in the nearest land. And after their defeat, they will defeat (84/30:2-3).

The second example concerns Israel. The Koran says:

We decreed for the children of Israel in the book: "Twice you will corrupt on the earth and you will rise to a great height" When the promise of the first of the two [corruptions] came, we sent against you some of our servants endowed with strong vigour, who prowled through the homes. So the promise was fulfilled. Then we gave you back the turn on them, provided you with wealth and sons and made you greater in number: "If you do good, it will be good for you, and if you do bad, it will be against you." When the promise of the other [corruption]

¹ Hallaf: *Les fondements*, p. 39.

² *Ibid.*, p. 45. The author has consecrated pages 39-41 and 45-46 to this question.

³ See Part II, chapter I.I.3.

⁴ Hallaf: *Les fondements*, p. 45.

comes, they will disgrace your faces, enter the Sanctuary as they entered it in the first time, and destroy completely whatever they come upon (50/17:4-7).¹

Quoting the last passage, Mustafa Mahmud claims that the Koran foretold the creation of Israel and its downfall.² As'ad Al-Tammimi, former Shaykh of the Al-Aqsa Mosque of Jerusalem, wrote a book inspired by this passage with the evocative title: *The disappearance of the State of Israel is a necessity according to the Koran*. For him, the verse foretells two marches of the Muslims on Jerusalem. The first is the one that took place during the Muslim conquest of Palestine. The second is recent.³ His interpretation has been rejected by the Grand Mufti of Jordan, Shaykh 'Abd-Allah Al-Qalqili who believes that the two destructions in question have taken place before, one through the Babylonian conquest and the other through the conquest of Titus in the year 70. He further adds that the Muslims tend to have recourse to such interpretations each time they are struck by misfortune. They search in the Koran or in the collections of the *Sunnah* for a solution to such a misfortune, believing that God has foretold their liberation without them making any effort, simply because they are Muslims.⁴

We note that the Koran repeats several times that the knowledge of secrets remains the preserve of God and that Muhammad was not endowed with such a gift:

Say: "Nor do I say to you that I have the storages of God, nor do I know the secret" (55/6:50).

If I knew the secret, I would have acquired much good, and evil would not have touched me. I am only a warner and an announcer for a people who believe (7:188).⁵

Such a manner of using "prophetic" religious texts for political ends can also be found in other religions. It is still the case among some protestant sects.⁶ The same applies to some Jewish milieus. Thus, on the 20 March 2003, the web edition of *Jerusalem Post* published for its readers an advert for a CD produced by Israeli scientists and mathematicians about the code of the Bible. It enabled the user, according to the said advert, to find in the Bible all the past, present and future events, as well as the name of each of the readers.⁷

e) Conformity with science

Classic Muslim authors had not evoked the argument which is very much in vogue today. Khallaf summarizes it as follows:

God revealed the Koran to serve as a proof for his Prophet and laws that are fundamental to human beings. He did not intend it to be a scientific treatise ex-

¹ The two examples are cited by Hallaf: *Les fondements*, p. 44-45.

² Mahmud: *Al-Qur'an*, p. 239.

³ Al-Tammimi: *Zawal*, p. 17-21.

⁴ Al-Qalqili: *Al-fatawa*, p. 97-105.

⁵ See also 6:59; 51/10:20; 11:31; 70/16:77; 48/27:65.

⁶ See, for example: Malgo: *Que dit la Bible sur la fin du monde*; Malgo, *Jérusalem aboutissement de tous les chemins*; Despagne, *Le Moyen-Orient and les choses qui doivent arriver bientôt*; Despagne, *Israël an 60/40: 1948-1988*.

⁷ <http://www.jewishsoftware.com/jptcoffer.htm>.

plaining the creation of the universe and man and explaining the displacements of stars. However, to prove the existence of God, his Oneness (*tawhid*) and in order to remind humankind of his benevolence, etc., some Koranic verses evoke natural laws which govern the universe. Modern science has proven the exactitude of the Koranic teachings and has thus confirmed the divine origin of the text. In fact, the contemporaries of the Prophet knew nothing about the scientific truths cited by the Koran. Hence, each time science discovers a natural law mentioned by the Koran, it is a demonstration once again that it originates from God.¹

Khallaf quotes a Koranic verse which establishes the relationship between the divine origin of the Koran and scientific data:

Say: "See yourselves! If it is from God and then you disbelieved in it, who is more misguided than he who is in a far dissension?" We will show them our signs in the horizons and in themselves, until it becomes manifest to them that it is the truth. Does your Lord not suffice as a witness on everything? (61/41:52-53).

Among the verses which, according to Khallaf, contain scientific truths unknown at the time of Muhammad, we quote the following three:

Have not those who disbelieved seen that the heavens and the earth were interwoven, then we split them and made from water every living thing? Would they then not believe? (73/21:30).

We created the human from an extract of clay. then we made him a drop [of sperm] in a firm settlement. Then we created out of the drop [of sperm] an adhesion; and out of the adhesion we created an embryo. Then out of the embryo, we created bones and we clothed the bones with flesh. Then we generated it as another creation. Blessed be God, the best of the creators! (74/23:12-14).

You will see the mountains that you deem inert, passing as pass the clouds. Such is the work of God who perfected everything. He is aware of what you do! (48/27:88).²

The Encyclopaedia of the Koran states that scientific truths must be judged in the light of the Koran and not the contrary, since the Koranic text is a revelation accomplished by the Omniscient. If therefore scientific knowledge contradicts the Koran, it must be rejected.³

Maurice Bucaille, a medical doctor, contributed to the trend of thought known among Christians under the name of *concordism* which consists in attempting to concord holy scriptures with modern knowledge. His book, *The Bible, the Qur'an and Science: the Holy Scriptures examined in the light of modern knowledge*, was translated into about ten languages, among which Arabic. The doctor considers that

¹ Hallaf: *Les fondements*, p. 41-42.

² *Ibid.*, p. 42-44.

³ *Al-mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 699. The encyclopaedia consecrates pages 692-723 to the science of the Koran.

the Koran, contrary to the Bible and the New Testament, is perfectly in conformity with science. The last paragraph of his book summarizes his procedure and that of his kind:

In view of the level of knowledge in Muhammad's day, it is inconceivable that many of the statements in the Qur'an which are connected with science could have been the work of a man. It is, moreover, perfectly legitimate, not only to regard the Qur'an as the expression of a Revelation, but also to award it a very special place, on the account of the guarantee of authenticity it provides and the presence in it of scientific statements which, when studied today, appears as a challenge to explanation in human terms.¹

The author came back to the same theme in a book written together with Muhammad Talbi,² a Muslim intellectual and professor in the Faculty of Letters in Tunis. After having exposed the opinion of the adepts and the opponents of such a tendency in the Muslim world,³ Muhammad Talbi offers us his own view:

We refuse [...], in the name of the respect we owe to others, to consider all those working in this direction [...] to be downright imbeciles. We only note [...] that if certain propositions arouse, by their seriousness and the competence of their authors, at least interest and reflection, others, on the contrary, adventurous and formulated, with an assurance which is but disconcerting and disarming naivety, by amateurs without knowledge neither science nor adequate preparation, join the fantasies of the usual popular vein.⁴

One should not reject any key which unlocks the meaning of a book which nonetheless remains, and this is essential, exclusively *huda lil-nas*, Guidance for humanity (87/2:185).⁵

An example evoked by Muslims to prove the divine origin of the Koran concerns two passages of the Koran dealing with two seas whose waters would never intermingle:

It is he who merged the two seas: the one fresh and palatable and the other salty and bitter. He made between them an interstice and a barred barrier (42/25:53).

He merged the two seas, meeting each other. Between them is an interstice which they do not overrun (97/55:19-20).

Commander Cousteau made a documentary demonstrating that in places where two seas encounter, notably when the water of the Mediterranean Sea pours out into the Atlantic Ocean, at the level of the straits of Gibraltar, a barrier separates the two seas in such a way that each one conserves its proper temperature, salinity and density. According to a rumour that Muslims continue to propagate, a rumour that was denied by the family of Cousteau already in 1991, the commander may have converted to Islam after having discovered that the Koran itself had described the phe-

¹ *The Bible, the Qur'an and Science*, p. 164. What is new is Muslim authors who praise this work. In this respect, see Al-Nimr: *Ilm*, p. 154-157; Al-Bahnasawi: *Al-sunnah*, p. 314-320.

² Bucaille; Talbi: *Réflexions*, p. 157-245.

³ *Ibid.*, p. 55-76.

⁴ *Ibid.*, p. 67.

⁵ *Ibid.*, p. 74-75.

nomenon. Yet, the phenomenon, as noted by Cousteau, was known by Phoenicians, many centuries before Jesus Christ, therefore before the advent of the Koran. We note that the Koran contradicts itself here. It speaks of a barrier, which would imply that mingling would be impossible, whereas salty water and sweet water mingle after periods of transition.¹

f) Numerical secrecy of the Koran

One of the proofs evoked by the Muslims to prove the divine origin of the Koran is the number 19 found in the following passage:

I will roast him in Saqar. What do you know about Saqar? It does not leave nor spare [anything]. It scorches the skins. Above him there are nineteen [protectors]. We have not made as companions of the fire but angels. And we have not made their number but as a proof for those who disbelieved, so that those who were given the book be convinced, those who believed increase their faith, those who were given the book and the believers do not suspect, and those in whose hearts is a sickness, and the disbelievers say: "What did God want by this example?" (4/74:26-31).

Use of the computer was made to prove that the Koran is governed by the number 19 or its multiples. The method, used by Jewish and protestant fundamentalists to prove the divine origin of the Bible,² was invented by Rashad Khalifa³ and was perpetuated by his followers after his assassination in 1990.⁴ Al-Hafni, another Muslim author, evokes the number 7 which appears several times in the Koran.⁵

g) Illiteracy of Muhammad

The argument serves to reinforce the previous ones. The Koran, according to the Muslims, is as prodigious, and therefore of divine origin, as Muhammad is illiterate, incapable of producing it himself or copying it from the scriptures of other nations, a reproach often levelled against him. In response to the detractors of Muhammad, the Koran says:

You were not reciting any book before it, nor were you writing it down by your right hand. Otherwise, the falsifiers would have suspected (85/29:48).

To affirm that Muhammad was illiterate (*ummi*), Muslims base themselves on the Koran:

Those who follow the messenger, the gentile [*ummi*] Prophet whom they find written down with them in the Torah and the Gospel (7:157).

Say: "O humans! I am God's messenger to you all, to whom belongs the kingdom of the heavens and the earth. There is no god but him! He revives and

¹ For more information on the debate, see <http://www.coranix.com/biblio/cousteau.htm>.

² See *La Découverte extraordinaire de 8 savants israéliens*, a document published by 'Le Centre Missionnaire,' 29270 Carhaix in France.

³ Khalifah: *Mu'jizat*. For the critique of this trend in general and of this author in particular, see Bint al-Shati': *Qira'ah fi watha'iq al-baha'iyyah*, p. 195ff.

⁴ See <http://www.submission.org/math-part2.html>. For a criticism, see <http://www.mostmerciful.com/nrashad.htm>; <http://www.answering-islam.org/Nehls/Ask/number19.html>.

⁵ Al-Hafni: *Mawsu'at al-Qur'an al-adhim*, vol. I, p. 41-42.

makes to die. Believe then in God, in his messenger, the gentile [*ummi*] Prophet who believes in God, and in his words. Follow him. Maybe you be guided!" (7:158).

The expression *ummi prophet*, understood by the Muslims in the sense of *illiterate prophet*, designates in fact one who does not possess any sacred scripture, a gentile, a pagan, called *goy* by the Jews. Christians designate Paul as being the apostle of the gentiles, that is, the apostle in charge of converting the pagans who were not in possession of any sacred text.¹ It is in this sense that the Koran uses the term to designate the non-Jews:

There are among them Gentiles, knowing nothing of the book but wishful thinking. They are only presuming (87/2:78).

Say to those who were given the book, as well as to the gentile: "Are you submitted?" If they submit, they will be guided (89/3:20).

"These Gentiles do not have any way against us." They say lies against God, whereas they know (89/3:75).

He is the One who sent to the gentiles a messenger from among them, to recite to them His revelations, purify them, and teach them the scripture and wisdom (110/62:2).

Al-Qurtubi (d. 1272) reports from Ibn-'Abbas (d. v. 686) that the term *ummi* was applied to all the Arabs, those who knew how to write and those who did not, because they did not have any revealed book.² Contrary to the dominant Muslim opinion, 'Abd-al-Mun'im Al-Hafni, author of the Encyclopaedia of the Koran, now accepts the idea that the term *ummi prophet* designating Muhammad signifies a prophet coming from a nation without a book, and not an illiterate prophet. He goes as far as saying that Muhammad, who characterized himself as the most eloquent among the Arabs, could only be so if he excelled in reading and writing.³

Whatever interpretation is given to the Koranic term *ummi*, Muslims are unanimous in saying that Muhammad did not write the Koran and that he is not its author. Muhammad is only a channel through which God transmitted the Koran to humanity, by means of revelation. Whoever affirms that Muhammad is the author of the Koran, be he a Christian living in the West, is considered a blasphemer by the Muslims. It is thus that in a letter published in *Courrier de Genève* the 19th August 1994, Miss Fawzia Al-Ashmawi, professor at the University of Geneva, strongly reacted against a humorous cartoon about the Koran published by the *Tribune de Genève* on the 8 August 1994 which portrayed, on the cover of the Koran, as the name of its author "Muhammad." Yet, she said, the Koran does not have for author Muhammad, but God himself. "As long as the West maintains the attitude of indifference and lack of interest with regard to Muslims, it should not be

¹ For more information on this debate, see Blachère, "Introduction," p. 6-12.

² Al-Qurtubi: *Al-jami' li-ahkam al-Qur'an*, vol. 18, p. 91-92.

³ Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. I, p. 178-181.

surprised by the violent reactions of the fundamentalists, when what is most sacred for them, the Koran, is tempered with directly or indirectly."¹

h) Inimitable in its origin

A Tunisian professor, Abdelmajid Charfi offers his own understanding of the inimitability of the Koran. He writes:

When the Koran defied believers to present ten chapters, or even one similar chapter, it was not because its eloquence would be inimitable, but rather because its divine source was not within the reach of mortal men and only the prophets and the messengers had access to it. Certainly, it is incontestable that the style of the Koran is refined, distinguished, unparalleled and there is no reader or auditor who is not aware of such a singularity. However, should we consider all the works of art, in verse or prose, paintings, sculptures, masterpieces of music, etc., each of them is inimitable in its own field, in spite of its human character. All that one can do in front of a masterpiece is to copy it. However, a copy is always inferior to the original.²

i) Imitating the Koran is forbidden

Even if Muslims repeat at will the Koranic challenge that it is impossible to imitate it, it does not mean for that matter that they permit such an imitation. Any person who would propose a work rivalling with the Koran would suffer the worst criticism and would even risk his life. The famous poet, Al-Muttanabi (d. 965) paid the price in the past for proposing to meet the Koranic challenge. Nowadays, Pastor Anis Shorosh, a Christian author of Palestinian origin living in the United States, published a book in the style of the Koran called *Al-Furqan al-haq* (The True *Furqan*).³ *Al-Furqan* is one of the names of the Koran. According to the Pasteur, an anonymous Arab poet of Bedouin origin pretending to have received divine inspiration, just as Muhammad had done, may have written the book in question in seven days (the Koran was revealed in about twenty-two years!).⁴ As one can imagine, the book provoked a vehement reaction from the Muslims who asked governments, institutions and individuals to forbid its distribution and launched lawsuits against those who had contributed to its publication and diffusion. They consider that the book was part of the war of the West and the Zionists against Muslims and that it aimed at diverting Muslims away from their faith. The Shaykh of Al-Azhar forbade the diffusion of the book and its consultation by Muslims.⁵

¹ See the letter and the reactions it provoked in Aldeeb Abu-Sahlieh: *Les musulmans en Occident*, p. 100-102.

² Charfi: *L'islam entre le message and l'histoire*, p. 57.

³ See the Arabic text and an English translation in <http://web.archive.org/web/20080822045534/www.islam-exposed.org/furqan/contents.html>.

⁴ http://wayback.archive.org/web/*/http://www.focusing-on-islam.com/Assets/PDF%20Docs/Summer%20Newsletter.pdf

⁵ <http://vb.altareekh.com/t36815/>.

C) Authentication of the Koranic text

It is not enough to affirm that the Koran is the work of God. It is also necessary to know whether the Koran contains all of the revelation given to Muhammad. The official doctrine answers affirmatively, but some allow themselves to doubt.

a) Official doctrine

The official doctrine affirms that the Koranic text represents the revelation God made to Muhammad, without any possible alteration. Does the Koran not say: "It is we who descended the remembrance, and we who will protect it" (54/15:9)?

In order to demonstrate that the Koranic text is authentic, Muslim authors narrate that the Angel Gabriel met with Muhammad annually for the revision of the texts revealed in the course of the previous year. Before the death of Muhammad, the angel made a complete revision and thus the Koran was entirely codified, structured and completed in accordance with the divine will. They add that Muhammad himself used to dictate to his secretaries the revelation he had received and to indicate to them the placement in the Koran of every revealed passage. They affirm, in addition, that the Caliphs who presided over the collection of the Koranic texts carefully made sure that the written text corresponded to what had been revealed to Muhammad, by having recourse to the scarce existing material and the testimony of the companions of Muhammad who had learnt the Koran by heart (*huffadh*).

b) Putting into question the authenticity of the Koran

Mondler Sfar, a Tunisian Marxist living in Paris, and who, for this reason, dared to put into question the authenticity of the Koran in his book published in Paris in 2000 wrote: "Questioning the authenticity of the Koranic text is today equivalent to blasphemy, to a particularly sacrilegious act against one of the principle dogmas of Islam, the most important, after the belief in God and his Prophet."¹

The author does not believe that God revealed the Koran. However, what he is interested in is to know whether the text at our disposal corresponds to the original one preserved in heaven on the original *tablets* (27/85:22; 63/43:4), whence the Angel Gabriel was communicating the revelation to Muhammad. To answer the question, he bases himself on the Koranic text itself and the vicissitudes that accompanied its collection. He quotes in this respect the Koran which says:

Say: "If the sea were ink for the words of my Lord, the sea would be exhausted before the words of my Lord are exhausted, though we were to bring the like thereof to add" (69/18:109).²

Sfar adds that the Koran indicates that some passages had been revealed but later on abrogated whilst continuing to appear in the text and others had been revealed, but Muhammad may have forgotten them (87/2:106). The demon himself interfered with the revelation by making Muhammad believe that it was question of divine texts (55/6:112; 103/22:52-53). The Koran also says that it contains verses

¹ Sfar: *Le Coran est-il authentique?* p. 9.

² *Ibid.*, p. 38-40.

constituting the essential of the Book (*um al-kitab*) and others which are equivocal (89/3:7).¹

The above Koranic elements and many more others prove, according to Sfar, that the current text of the Koran does not correspond to the one preserved by God. Consequently, verse 54/15:9 which comprises God's commitment to safeguard the revelation concerns not so much the text at our disposal but the one in God's possession, the one on the *tablets*.²

Sfar further points out that the collection of the Koran and its shaping went through different stages marked by manipulations leading to the current text, dislocated and muddled, containing anomalies and imperfections on the level of style and language, as already mentioned above. The Koran in our hands could not, by consequence, be in conformity with what came out of the mouth of Muhammad, and less so with God's preserved text. The tradition according to which the Angel Gabriel used to revise annually the Koran together with Muhammad would therefore be, according to Sfar, nothing more than a myth invented to avert the questioning of the authenticity of the Koran.³ Sfar goes as far as affirming that the Koran was not dictated by the angel, but was simply inspired, and that, by consequence, the formulation of the Koranic text was the work of Muhammad. This brings us closer to the Christian concept of revelation: the Holy Spirit inspired the evangelists, and they translated the inspiration into their own words according to their own styles; hence the divergence among the four gospels.⁴ Sfar brings nothing new with regard to what Western orientalists have written, but he has the merit of being the first Muslim to present his arguments according to Muslim logic. Not being a jurist, he does not tell us what the juridical consequences of putting into question the authenticity of the Koran in such a manner are. His vision nonetheless allows for distancing oneself from the Koranic text which has thus become a historical text manipulated by the political and religious authorities of the 1st century of Islam to safeguard temporal interests. Thus, the Koran does not fulfil the quality of authenticity and, for this reason, it cannot be used to discover the norms dictated by God.

III. Koranic norms

1) Normative content of the Koran

The Koran counts 6236 verses subdivided into 114 chapters, comprising jumbled up moralizing narrations, historical or mythical facts of Arabia, polemics and reports of the war waged against the adversaries of the new religion. It is generally considered that among these verses around 500 explicitly concern law.⁵ This may seem little, but, compared to the New Testament, the figure is very significant. There should be added to these many verses which serve as auxiliaries for the establishment of the juridical norms. In fact, the jurist cannot limit himself to the

¹ *Ibid.*, p. 31-33.

² *Ibid.*, p. 15-18.

³ *Ibid.*, p. 11.

⁴ *Ibid.*, p. 10 and 19-21.

⁵ Al-Hakim: *Al-usul*, p. 100.

knowledge of the normative verses alone to know Islamic law. The reader will find at the end of this work an analytical juridical table of the Koran.

Although the Koran is the first source of Islamic law, western jurists should not for that matter expect to find therein a code in the formal sense of modern law, with chapters proper to each material. The juridical verses are dispersed everywhere. In order to grasp their real implications, one needs to assemble them together, know the circumstances under which they were revealed and which ones have been abrogated. On the other hand, the normative verses have not been wrought out in the same way that the articles of law have been. They are rather multiform injunctions of a moralizing discourse. Classic jurists have, for this reason, proceeded with the analysis of Koranic norms, and this is the object of the following developments.

2) Classifications of Koranic norms according to their clarity

The Koran says:

We descended on you the book, as manifest [explanation] of everything (70/16:89).

Yet, elsewhere the Koran makes it incumbent upon Muhammad to explain the content of the book:

We descended to you the remembrance, so that you show to the humans what was descended for them. Maybe they think! (70/16:44).

Some verses provide definitive and detailed indications (*qat'i wa tafsili al-dalalah*) such are those determining the shares of some heirs:

God enjoins you concerning your children: The male shall have the equal of the share of two females (92/4:11).

No any other possible interpretation is possible here since the text is clear. In other verses the Koran contented itself with a definitive but general norm (*qat'i ijmali*) whose explanation necessitated recourse to other sources in order to determine the extent of its impact. Hence, the Koran prescribes prayer as follows:

Perform the prayer from the sun's decline till the darkness of the night, and [recite] the Koran at dawn, Indeed the Koran [recital] at down is witnessed (50/17:78).

The verse says nothing about the number of prayers and their content. To find out, one needs to scrutinize the *Sunnah* of Muhammad. The same could be said about the law of retaliation. In other cases, one has to try and find the details in other verses of the Koran.

Some verses prescribe definitive norms, but through terms that may have more than one sense, leading to divergence among the juridical schools. They are called in that case verses with a speculative sense (*dhanni al-dalalah*). Such is the case for the term *quru'* in the verse 87/2:228, the term signifies either menstruation or purification:

Repudiated women shall wait for three menstruations (87/2:228).

It is clear that repudiated women cannot remarry immediately after the repudiation. In this issue the norm is definitive. Where it is less clear is the period necessary for her to wait.¹

In order to understand the true meaning of a verse, one has to try and go back to circumstances of revelation. Thus, 'Umar (d. 644) wanted to punish someone for drinking wine. The drinker recited him the following verse:

There is no blame on those who believed and did good deeds for what they ate when they feared [God], believed and did good deeds; then they feared [God] and believed, then they feared [God] and did good. God loves the good doers! (112/5:93).

Consulted, Ibn-'Abbas (d. v. 686) responded that the verse concerned only those who had taken it before the revelation of verse 112/5:90 which forbade one to approach wine.²

3) Apparent norms and occult norms

Verses of the Koran can have two meanings, one apparent (*dhahir*) and another occult, esoteric (*batin*). Whereas the apparent meaning is the one that can be understood by everyone who knows the language, the occult meaning necessitates a bit more perspicacity. Thus, the Koran says:

So do not make equals to God, whereas you know (87/2:22).

The verse is aimed in the first instance against the idols the Arabs used to adore at the time of Muhammad. It is therefore question of the condemnation of idolatry. Scholars, however, extend the meaning to include in the term rival the evil penchants of the soul, even the religious hierarchy. The latter extension in meaning is rendered possible by the following verse:

They took their doctors, their monks, and the Messiah son of Mary, as lords besides God, whereas they are commanded to adore only one God. There is no god but him! Be he exalted! [High be he] above what they associate! (113/9:31).

Another example: the Koran says:

We said: "O Adam! Reside in the garden, you and your wife, and eat bountifully from where you want. But do not approach this tree. Otherwise you would be of the oppressors" (87/2:35).

The verse contains the prohibition of eating from a given tree. But scholars have derived from it a hidden meaning: the incitement to submit oneself to God alone is not to let oneself be seduced by external demands.

In this case, the two meanings, the apparent and the hidden, are possible, on condition that the hidden meaning does not contradict the apparent one. Priority is therefore given to the apparent meaning. In order to discover the hidden meaning, one has to understand the mechanism of the Koranic thought, to know elements surrounding the Koran and the circumstances that accompanied its revelation.

¹ Shalabi: *Usul*, p. 105-110.

² *Ibid.*, p. 112-113.

It is not allowed to stop at the apparent meaning of the Koran because that could lead to neglecting its spirit. Thus, verse 113/9:41 says:

Mobilize, light and heavy, and struggle with your wealth and your lives in God's way. That is better for you. If you were knowing!

Nonetheless, verse 113/9:91 brings forth an extenuation:

There is no blame on those who are infirm, or ill, or who find no resources to spend, if they are sincere to God and his messenger.

Similarly, the Koran foresees the cutting of the hand of the thief:

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise! (112/5:38).

The definitive verse would not, however, be applied at all times. The Caliph 'Umar (d. 644) suspended its application during the time of famine.

Similarly, the Koran does not foresee cajoling "new converts" by paying them in order to have their support:

The alms are for the poor, the paupers, those who work for them, those whose hearts are rallied, [the emancipation] of the necks, those who are overloaded [of debts], the [struggle] in God's way, and the traveller (113/9:60).

The norm was abrogated by 'Umar (d. 644) when the Muslim community became stronger, not having any more the need to win the sympathy of others.

The Koran says:

If you fear that they do not conform to God's bounds, there is no blame on them for what she ransomed herself therewith (87/2:229).

The verse allows the woman to liberate herself from her husband by redeeming herself by paying a sum of money. This can suggest that the husband can crack down on the wife in order to extort money from her. And yet, this would go against the spirit of the Koran which says elsewhere:

Give to the women their dowries willingly. But if they be pleased to remit you anything, eat it pleasantly and gladly (92/4:4).

The Koran contains verses with allegorical meaning which cannot be understood through the apparent meaning. Thus, verse 87/2:245 says:

Who is it that will lend unto God a good loan, so he will double it for him many doubles? (87/2:245).

This made Jews to snigger: "God is poor and we are rich." Abu-al-Dahdah responded to them: "God is generous, he asks us to lend him from what he gave us."

Some religious groups did not hesitate to go beyond the apparent meaning in order to find in the words some hidden allusions in support of their politico-religious doctrine. The Koran says:

Al-Safa and Al-Marwah are among the rituals of God. Whoever made the pilgrimage to the House or pays a visit [to it], there is no blame on him to circulate between the two. Whoever volunteered good, then God is thankful, knower (87/2:158).

Al-Safa and Al-Marwah are two places related to the ritual of pilgrimage. But some, *al-batiniyyah* (occultists), say that the first term designates in fact Muhammad, and the second 'Ali.

In another verse, the Koran says:

Salomon inherited David and said: "O humans! We have been taught the language of birds; and have been given of everything. This is the manifest favour" (48/27:16).

Some authors conclude that 'Ali inherited from Muhammad. Other verses are used in the same perspective.¹

4) Norms incorporated in Koranic narrations

Often the Koran reports a narration implicating a personality of the Old Testament, the New Testament or other. The narration may therefore contain an allusion to a norm related to this personality. How should such a norm be understood? Does the fact that the Koran mentions it signify that it approves of it, or even imposes it, or is it simply a factual element of the narration, no more, no less?

Some verses sometimes contain the clear indication that the Koran disapproves of some event, as in the following verses:

The Jews said: "Ezra is son of God" and the Nazarenes said: "The Messiah is son of God." That is their saying from their mouths, imitating the saying of those who have disbelieved before. May God combat them! How then are they perverted? (113/9:30).

They said: "These are cattle and tilt prohibited. Only someone we wish to may eat them." According to their assertion! And [these are] cattle whose backs are forbidden, and cattle over which they do not mention God's name, forging a lie against him! He will repay them for what they were forging. They said: "What is in the wombs of these cattle is reserved for our males, and forbidden to our wives." If it is [born] dead, they are associates therein. He will repay them for their depiction. He is wise, knower (55/6:138-139).

Other verses, on the contrary, do not contain such an indication. The silence of the Koran has been interpreted by the majority of the jurists as approbation. We give some examples.

The Koran narrates concerning the last judgment:

Every soul is engaged for what it earned. Except the companions of the right. In gardens, they wonder mutually about the criminals: "What conveyed you in Saqar?" They will say: "We were not of the praying, we did not feed the pauper, we discoursed with the discourses, and we were belying the day of judgment, until came to us the conviction" (4/74:38-47)

Jurists deduce from these verses that Islamic law is a general application and concerns as much the believers as the non-believers.²

The Koran says, concerning Joseph:

¹ Hasab-Allah, p. 25-28.

² *Ibid.*, p. 28-30.

When he had provided them with their provisions, he put the cup in his brother's packsaddle. Then an announcer announced: "O caravan! You are thieves." They said while they turned toward them: "What are you missing?" They said: "We miss the king's goblet. Whoever brings it shall have a camel's load and I am guarantor thereof" (53/12:70-72).

Jurists deduce from these verses that it is allowed to have recourse to the guarantee contract (*ja'alah*) since the Koran does not contain any negative judgment against this act.

The Koran says, concerning Moses:

When he arrived to the water of Madian, he found there a crowd of humans watering [their herds]. He also found two women besides them keeping back [their herds]. He said: "What is your problem?" They said: "We cannot water our flocks until the shepherds depart. Our father is a very old man." He watered [the herd] for them, then returned into the shade and said: "My Lord! I am to what you descended to me from goodness poor" (49/28:23-24).

Jurists deduced from these verses that a woman can work only in case of necessity, on condition that she does not compete against men. Men should endeavour to replace her in the work in order to safeguard her honour.

The Koran says concerning Mary:

You were not with them when they threw their pens [to know] who would be the guardian of Mary! (89/3:44).

Jurists deduce from this verse that it is allowed to play dice in order to designate someone.

Such a procedure of deducing juridical norms from verses apparently insignificant shows how jurists had at heart the legitimatization of acts by relating them to the slightest Koranic clue, aware of the fact that left alone human beings cannot determine what is licit and what is not without divine illumination.

5) Clear norms and equivocal norms

The Koran says it contains some clear verses (*muhkamat*) and others which are equivocal (*mutashabihat*):

It is a book whose signs are perfected and then detailed from a wise, an aware (52/11:1).

It is he who descended the book on you. Wherein are decisive signs which are the mother of the book and others being ambiguous. Those in whose hearts is deviance, follow what there is ambiguous, seeking the subversion and seeking its interpretation. However, no one knows its interpretation except God. Those who are firm in the knowledge say: "We believed therein. All is from our Lord!" But only those endowed with intelligence remember (89/3:7).¹

On the basis of such verses, religious scholars say that some verses clearly indicate the intention of God, but some others do not. The former are called clear (*muhka-*

¹ The concept of straightforward verses (*muhkamat*) appears in verses 22:52 and 95/47:20. The concept of equivocal verses appears in verses 87/2:119 and 59/39:23.

mat) and the others equivocal (*mutashabihat*).¹ They add that equivocal verses are those whose meaning is hidden and cannot be understood by simply having recourse to reason, the Koran or the *Sunnah* of Muhammad. Understanding their meaning is reserved to God alone. They allow for different interpretations, whereas the clear verses allow only for one interpretation.² Subhi Al-Salih considers that equivocal verses have for objective exhorting the believers to be interested in different sciences that help to understand them.³ Al-Zarqani, on the contrary, warns against imprudent attempts at interpreting them and demands that the determination of their meaning be reserved to God.⁴

As an example of equivocal verses, we quote the verse 87/2:124:

In that time, your Lord tested Abraham by words, and he fulfilled them. He said: "I will make you a guide for the humans." [Abraham] said: "And [who else] from my descendants?" [God] said: "My covenant will not reach the oppressors."

Interpreting this verse, Al-Tabari (d. 923) says that God subjected Abraham to the kind of trials the nature over which exegetes differ. He gives around ten diverging opinions. Among which:

- The words indicate the thirty commandments: ten in chapter 113/9, ten in chapter 74/23 and ten in chapter 90/33 of the Koran.
- They indicate five practices related to the head (cutting the moustache, gurgling, swallowing water, picking the teeth and making the line in the hair); five practices related to the body (cutting the nails, shaving pubic hair, circumcising oneself, epilating the armpits, washing away the rest of the excrements and urine with water).
- They indicate ten practices; six of which are related to the body (shave the pubic hair, circumcise oneself, epilate the armpits, cut the nails and the moustache, washing oneself on Friday) and four related to the rituals (circumambulating the Ka'aba, ambulating between Safa and Marwa, lapidating Satan with stones and going from Arafah to Muzdalifah during the pilgrimage).
- They indicate the emigration of Abraham from his country, the abandonment of his tribe, the command to sacrifice his son and circumcision.⁵

To these, Al-Razi (d. 1209) adds the debate between Abraham and his parents and his tribe concerning prayer, fasting, charity, the sharing of the booty and hospitality.⁶

Supporters of male circumcision concluded that circumcision is among the trials to which Abraham was subjected. And, since the Koran considers Abraham as an example to be followed by Muslims (91/60:4), the latter must undergo circumci-

¹ Al-Zarqani, vol. 2, p. 270.

² *Ibid.*, p. 272.

³ Al-Salih: *Mabahith*, p. 286.

⁴ *Ibid.*, p. 293.

⁵ Al-Tabari: *Tafsir*, vol. 1, p. 414-416; Al-Tabari: *Tarikh*, vol. I, p. 143-146.

⁶ Al-Razi: *Al-tafsir*, vol. 3, p. 37-38. See also Al-Tubrusi: *Tafsir*, vol. 1, p. 76-77; Al-Qurtubi: *Al-jami'*, vol. 2, p. 97-98; Ibn-Kathir: *Tafsir*, vol. 1, p. 164-167.

sion as did Abraham. And yet, the deduction of circumcision from such a verse, as was done by classic jurists, is contested by modern Muslim authors. Such was the case for Al-Shawkani (d. 1834) who preferred to leave to God the meaning of the verse instead of interpreting it through contradictory and less reliable narrations.¹ Shaykh Muhammad 'Abduh (d. 1905) considers the classic interpretation audacious. He attributes it to the Jews who may have introduced it among the Muslims in order to ridicule the latter's religion. He asks himself, how could God put Abraham to trial through practices that a small child could accomplish and then appoint Abraham to be the guide of men and the root of the tree of prophecy?² Responding to those who were reproaching him for contradicting Ibn-'Abbas (d. v. 686), 'Abduh retorts that he respects the latter but does not believe in the narration.³ Shaykh Shaltut (d. 1964) equally rejects the interpretation of the verse as signifying circumcision. He considers such an interpretation an exaggeration.⁴

The initials of some verses as well as those which attribute to God morphological qualities are also considered equivocal:⁵ the hand of God,⁶ his eye,⁷ sitting on the throne,⁸ keeping the keys of the unknowable,⁹ etc.

In order to understand the meaning of some verses, one has to have recourse to interpretation (*tafsir*). But this is not accessible to all and should not be divulged without precaution. In this respect, Ibn-Rushd (Averroes, d. 1198) classified people in three categories:

- people who do not have the sense of interpretation;
- people who know the dialectic interpretation;
- people who possess the art of philosophy.

He adds:

The exposition of one of such interpretations to one who is not apt, especially demonstrative interpretations, and unfamiliar with common knowledge, leads to the disbelief (*kufir*) of the one to whom it is done and the one who does it.

He gives an example of a Koranic response for common people:

They ask you about the soul. Say: "The soul is of the affair of my Lord." You are not given from the knowledge but a few (50/17:85).¹⁰

Hasab-Allah, a contemporary author, writes saying that it is useless to pose questions concerning things which do not entail obligation. Such questions are useful neither for the life to come, because God will judge according to what we should or should not do, nor for the current life, because the questions do not help to improve

¹ Al-Shawkani: *Fath al-qadir*, vol. 1, p. 139-140.

² 'Abduh: *Tafsir*, vol. 1, p. 454.

³ *Ibid.*, p. 455.

⁴ Aldeeb Abu-Sahlieh: *Khitān*, annex 7.

⁵ See Part II, chapter I.I.3.C.

⁶ Verses 89/3:73; 112/5:64; 111/48:10; 94/57:29.

⁷ Verses 52/11:37; 74/23:27; 37/54:14.

⁸ In the verses 39/7:54; 51/10:3; 96/13:2; 20:5; 42/25:59; 75/32:4; 94/57:4.

⁹ Verse 55/6:59.

¹⁰ Ibn-Rushd: *Traité*, p. 26-27.

life or to acquire more experience. That is why people who are preoccupied with things of no clear interest lose their faith and divert from the right path. And yet, this is not the objective of the Koran and not so is the human beings progress towards what is good. The author reports that 'Ali (d. 661) was asked what he thought about destiny, he responded: "An obscure way not to be followed, a deep sea not to be crossed and a secret of God not to be assumed." He was also asked about the significance of the terms: "The blowing winds. Bearing rain. Bringing provisions. Distributing them as commanded" (67/51:1-4), he rebuked the inquirer: "Alas for you, ask questions to understand and not out of stubbornness."¹

6) Koran as the standard of measure for other sources

The Koran is not only a source of law containing juridical norms, but it is also the standard of measure which serves to legitimize other sources such as *Sunnah*, consensus (*ijma'*), analogy (*qiyas*), etc. In fact, from the moment the Muslim is convinced that the Koran is the word of God, the unique legislator, he must address himself to it first in order to judge if it is possible or not to associate with it other sources of norms governing his life. It is the foundation of the whole system of Islamic law, as we shall see in the subsequent chapters.

IV. Exegesis of the Koran (*tafsir*)

1) The meaning of exegesis

The questions that we have just studied above show the difficulty of understanding the Koran for an average Muslim. In order to facilitate such a comprehension, Muslim religious scholars have tried to interpret the obscure passages. The term used in this regard is *tafsir*, mentioned only once in the Koran in verse 42/25:33: "Whatever argument they come up with, we provide you with the truth, and a better understanding." Also used is the term *ta'wil*, mentioned in 15 verses of the Koran to designate explanation of an obscure text, as in the interpretation of dreams (notably in the story of Joseph).² Some authors, however, make a distinction between these two terms:

- *Tafsir*: explanation or clarification coming from the sacred texts, notably the Koran and the *Sunnah*. In positive law, one speaks about legislative or authentic interpretation, that is, coming from the legislator himself, be it within the law itself or through the explicative message of the law. In this regard, *tafsir* is not susceptible to error.
- *Ta'wil*: interpretation based on rational effort (*ijtihad*). It is the fact of searching beyond the apparent sense another probable and acceptable meaning, but which remains susceptible to error.

Interpretation can be correct, probable and vitiated. In order for an interpretation to be correct it must fulfil the following conditions:

- The term must be susceptible to interpretation, which is not the case for the terms with explained (*mufassar*) or definitive (*muhkam*) meaning.

¹ Hasab-Allah, p. 23-25.

² Verses 3:7; 4:59; 39/7:35; 51/10:39; 12:6; 12:21; 12:36; 12:37; 12:44; 12:45; 12:100; 12:101; 50/17:35; 18:78; 18:82.

- The meaning to be attributed to the term must be sure, or at least probable.
- The interpretation must spring from acceptable proofs based on the text of the Koran or the *Sunnah*, analogy (*qiyas*), consensus (*ijma'*) of the scholars or the *ratio legis* (reason of law).
- The interpretation must not contradict an explicit text.

It is assumed that the equivocal verses (*mutashabihat*) of which we spoke in the previous point should not be the object of interpretation. The verses must be accepted, without any explanation, even if some exegetes endeavour to interpret them in an allegorical manner.

Muslim scholars say that exegetes must be endowed with a number of qualities: be Muslims, be part of the community (*ummah*) and not a sect (*ta'ifah*), be well-intentioned and be knowledgeable in fifteen branches related to language, religion and law. They add that every interpretation of the Koran must be based on five sources:

- The Koran itself, by looking for the relationship between different verses, distinguishing those which are of general character and those of special character, or explaining a concise verse through a more detailed one.
- The *Sunnah*, by having recourse to authentic (*sahih*) hadiths and avoiding those that are weak (*da'if*).
- The opinions (*ra'y*) of the companions (*sahabah*) of Muhammad who were witnesses of the revelation and its circumstances.
- The opinions of the followers (*tabi'un*), who came after the companions and who were educated by the latter.
- Personal reasoning (*ijtihad*), this source is the last of all.¹

It should be noted here that the Sunnites as well as Shi'ites have their own exegeses and avoid those of the others. After mentioning many Sunni commentaries, an encyclopaedia published by the Egyptian Ministry of *waqf* contented itself with saying that the Shi'ites and the other groups "have their own exegeses, which, however, do not lack extreme fanaticism, interpreting Koranic passages in order to satisfy their principles or at least in order not to contradict them, emptying in this way Koranic terms of their meaning and implications."²

Exegeses are classified into different categories some of which we speak of in the following points.³

2) Traditionalist exegesis

Traditionalist exegeses are based on hadiths transmitted by the companions of Muhammad and their followers. It is called *tafsir bil-ma'thur* (exegesis by the transmitted tradition). Analysing these exegeses, Al-Dhahabi (d. 1348)⁴ reached the conclusion that often it is a question of narrations and legends taken from the Jews

¹ *Al-Mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 251-253.

² *Ibid.*, p. 281.

³ See, for these categories: *Al-mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 271-291.

⁴ Al-Dhahabi: *Al-tafsir*, vol. I, p. 159-160.

(*isra'iliyyat*) which should be mistrusted. He preconized an edition purged of classic exegeses in order to "purify them from this venomous ideological food." As for those that have been edited, he considers that they should be put in public libraries at the disposal of researchers only, "of which they will have need only if they want to have knowledge of these contaminated and contaminating materials."¹

Among the traditionalist exegeses the following can be notably cited:

- Al-Tabari (d. 923): *Jami' al-bayan fi tafsir al-Qur'an*.
- Ibn-Kathir (d. 1373): *Tafsir al-Qur'an*.

3) Rational exegeses

Some exegeses tried not only to base themselves exclusively on hadiths, but also to have recourse to reason (*'aql*). It is called *tafsir bil-ra'y* (exegesis by opinion). The exegeses were initiated by the Mu'tazilites, often with the aim of supporting their proper rational philosophy. Al-Zamakhshari (d. 1144) said in this regard that one was to follow reason without paying attention to what had been transmitted by tradition. Other contemporary exegetes have adopted this attitude. Thus, Shaykh Muhammad 'Abduh (d. 1905) said that in case of contradiction between reason and a transmitted tradition, priority should be given to reason. The adversaries of this trend of thought consider that reason is not capable of judging and replacing tradition. The partisans of the approach respond that the Koran itself invites people to reason (92/4:82 and 95/47:24).

Among the rational exegeses the following can be notably cited:

- Al-Zamakhshari (d. 1144): *Tafsir al-kashshaf*.
- Al-Razi (d. 1209): *Mafatih al-ghayb*.
- Al-Muhalli (d. 1459) and Al-Suyuti (d. 1505): *Tafsir Al-Jalalayn*.
- Al-Shawkani (d. 1834): *Fath al-Qadir*.
- Muhammad 'Abduh (d. 1905) and Rashid Rida (d. 1935): *Tafsir al-manar*, incomplete.
- Ibn-'Ashur (d. 1973): *Al-tahrir wal-tanwir*.

4) Esoteric exegeses

Esoteric and Sufi milieus interpret the Koran in their own way, searching for the hidden meaning (*batin*) behind the apparent meaning (*dhahir*). They base themselves for that on the Koran itself which affirms:

Whatever is in the heavens and on the earth exalted God. He is the mighty, the wise. To him belongs the kingdom of the heavens and the earth. He revives and makes to die. He is powerful on everything. He is the first and the last, the outward and the inward. He is knower of everything (94/57:1-3).

Such an interpretation was also followed by the philosopher Avicenna (d. 1037) and the Sufi Ibn-'Arabi (d. 1240), it is found in the Isma'ili encyclopaedia *Rasa'il*

¹ For a critique of Israeli elements in the Koran, see *Al-mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 295-297.

ikhwan al-safa (of the 10th century), and in the Druze writings. It is generally rejected by the Sunnites.

5) Thematic exegeses

Since the Koran is the first source of law, many exegeses are dedicated to its normative aspects. Among the thematic exegeses, the following can be notably cited:

- Al-Jassas (d. 981): *Ahkam al-Qur'an*.
- Ibn-al-'Arabi (d. 1148): *Ahkam al-Qur'an*.
- Al-Rawandi (d. 1187): *Fiqh al-Qur'an*.
- Al-Qurtubi (d. 1272): *Ahkam al-Qur'an*.
- Al-Miqdad Al-Hilli (d. 1423): *Kanz al-'irfan fi fiqh al-Qur'an*.
- Ahmad Al-Ardabayli (d. 1585): *Zubdat al-bayan fi sharh ayat ahkam al-Qur'an*.

There exist also exegeses of normative verses related to certain domains such as those concerning women and interest (*riba*: usury). Other exegeses are concerned with scientific verses, aiming at demonstrating that the Koran contains scientific notions unknown by contemporaries of Muhammad, thereby proving that the Koran comes from God.

6) Selected exegesis

The Supreme Council of Muslim affairs in Egypt prepared, in virtue of the ministerial decree 59 of 1960, an exegesis entitled: *Al-Muntakhab fi tafsir al-Qur'an al-Karim*. The exegesis paraphrases Koranic verses in an Arabic language that is accessible to the public. It was translated into French, English, German, Spanish, Russian and Indonesian. It foresees to make translations into other languages: Urdu, Swahili, Chinese, Hebrew, etc.¹

7) Linguistic exegesis

An exegesis in four big volumes, published in 2001,² dedicated to the explanation of Koranic terms, word by word.

Chapter II. The *Sunnah*

Sunnah is considered by Muslims in general as the second source of Islamic law, after the Koran. Khallaf writes in this respect:

Muslims acknowledge, unanimously, that the sayings and the acts of the Prophet or those he approved of, whose objective was to install law or to set an example and whose chain of transmission is sure and reliable, have the power of

¹ For more information on this exegesis, see *Al-mawsu'ah al-qur'aniyyah al-mutakhassisah*, p. 874-876.

² *Ma'ani al-Qur'an al-karim*.

law... That means that prescriptions derived from the *Sunnah* have the force of law equal to those mentioned in the Koran.¹

We shall see later that the unanimity of which Khallaf speaks does not exist in this domain. Consequently, the affirmation of Khallaf must be understood as a condemnation of every person who denies the normative value of the *Sunnah*.

I. Formal description of the *Sunnah*

1) Definition

The Koran mentions the term *Sunnah* 16 times to designate the behaviour of God or that of man. Translations of the Koran use the term "rule" or "custom" as in the following passage:

They were about to scare you away from the land to oust you therefrom. But then they would not have stayed behind you, but a few. [Such is] the law of our messengers we sent before you. You will not find a deviation in our law (50/17:76-77).

Muslim jurists use the term *Sunnah* to designate all the sayings, the acts and the implicit or explicit approbations attributed to Muhammad, and even to his companions. Sometimes, the term is replaced by the one of hadith, but this one indicates generally an oral narration.

By extension, the term *Sunnah* designates also the Muslim orthodoxy, in opposition to *bid'ah* and *Shi'ah*, Shi'ism. By this very fact, one speaks of *ahl al-sunnah* (Sunnites), who comprise the majority of Muslims, in opposition to *ahl al-shi'ah* (Shi'ites), the partisans of 'Ali (d. 661).

2) Collection of the *Sunnah*

Already at the time of Muhammad, Muslims endeavoured to imitate him in his gestures and to follow his precepts. The need may have been translated into an effort of research and into the oral and written preservation of such gestures and precepts. But, according to a hadith attributed to Muhammad, the Prophet forbade writing the *Sunnah*, so as to avoid any confusion with the Koran. It is only at a later stage that Muhammad went back on the prohibition. After his death, some people started to collect the testimony of those who had known him and were his companions. To do so it was necessary to search for the companions in different places. A true treasure hunt was thus launched. The central authorities at the beginning hesitated to interfere with the enterprise. The Caliph 'Umar (d. 644), having manifested the desire to put in writing the tradition of Muhammad, ended up renouncing the idea out of the fear that Muslims would take more interest in the collection of the *Sunnah* and abandon the Koran. The fear of 'Umar was generalized with regard to any book other than the Koran. Each time he came across a book he burnt it. The fear was shared by others such as the Caliph 'Ali (d. 661) and some companions of Muhammad.² But Shi'ites affirm that the hadith of Muhammad forbidding the writ-

¹ Hallaf: *Les fondements*, p. 55.

² Al-Khatib: *Al-wajiz*, p. 138-150.

ing of the *Sunnah* was invented by 'Umar in order to prevent the recourse to narrations legitimatizing the attribution of power to the lineage of 'Ali (d. 661).¹

The same reasons that were prevalent during the codification of the Koran ended up imposing themselves. There was fear of losing the hadiths as a result of the disappearance of the companions of Muhammad. Similarly, it was necessary to counteract the tendency of the invention of hadiths attributed to the latter. But contrary to the Koran, the *Sunnah* was not collected together into a unique official collection approved by the State.

The Caliph 'Umar Ibn 'Abd-al-'Aziz (d. 720) was the first to encourage the putting into writing of the *Sunnah*. He asked his governor in Medina, Abu-Bakr Ibn-Muhammad Ibn-'Amru Ibn-Hazm, to collect together the notes taken by the companions of Muhammad. The first collection has disappeared in the meantime. A similar order was issued by the same Caliph to Muhammad Ibn-Muslim Ibn-Shahab. The collection has also disappeared. The most ancient collections preserved are:

- The *musnad* attributed to Imam Zayd (d. 740), founder of the Zaydite School. The collection comprises 550 hadiths classified according to the following subjects: purification, prayer, funerals, legal charity, fasting, pilgrimage, sale, society (juridical interactions involving two or more people), testimony, marriage, divorce, penal law, rules regarding war and succession.
- The *Muwatta'* attributed to the Imam Malik (d. 795), founder of the Malikite School, whose three versions have been edited. Like the previous one, it also follows a classification that is predominantly juridical. The classification served as a model for other collections of the *Sunnah* and for the treaties of the later Muslim jurists. It is interesting to note that this collection, like the preceding one, establishes legal norms almost exclusively based on the narrations of Muhammad, rarely quoting the Koran, most probably due to the difficulty of interpretation.
- The *Musnad* of Ahmad Ibn-Hanbal (d. 855), founder of the Hanbalite School. It is comprised of 28,199 hadiths selected from among 750,000 hadiths. In this collection, the hadiths are classified not by subject, but by order of companions closer to Muhammad whose number goes up to 700 male companions and 76 female companions.

The three collections enjoy high esteem among Sunnite Muslims. But they also pay particular attention to six other thematic collections.

- The collection of Al-Bukhari (d. 870), called *Sahih al-imam Al-Bukhari* or *Al-jami' al-sahih*. It is considered to be the most important work, after the Koran. It attracts a lot of interest and has been the object of 300 exegeses throughout the centuries.² It contains 9,082 hadiths, including doubles.

¹ Al-Fadli: *Al-madhab al-imami*, p. 76.

² Al-Ahdal: *Mustalah*, p. 73.

- The collection of Muslim (d. 874), called *Sahih al-imam Muslim*, or *Al-jami' al-sahih*. It contains 7,563 hadiths. The work starts with an introduction to the science of *Sunnah*.
- The collection of Abu-Da'ud (d. 888), called *Sunan Abu-Da'ud*. Contrary to the two preceding collections, this one limits itself to normative questions and by this very fact it is the work of reference *par excellence* for jurists. It contains 5,274 hadiths.
- The collection of Al-Tirmidhi (d. 892), called *Sunan Al-Tirmidhi*. It contains 3,956 hadiths.
- The collection of Al-Nasa'i (d. 915), called *Sunan Al-Nasa'i*. It contains 5,761 hadiths.
- The collection of Ibn-Majah (d. 886), called *Sunan Ibn-Majah*. It contains 4,341 hadiths.

The first two collections, called *Al-Sahihan* (the two authentic), limit themselves to citing the hadiths judged authentic (*sahih*). The other collections, on the contrary, assemble authentic hadiths and those less authentic, signalling their defects.

The works we have just made allusion to are those that are recognized by the Sunnites. Shi'ites have their own which comprise only the hadiths reported by the family of 'Ali (d. 661). Among their collections, we quote notably:

- Abu-Ja'far Al-Kulayni (d. 939): *Al-kafi fi 'ilm al-din*.
- Abu-Hanifah Al-Kummi (d. 991): *Kitab man la yahduruh al-faqih*.
- Abu-Ja'far Al-Tusi (d. 1067): *Tahdhib al-ahkam*.
- Muhammad Al-'Amili (d. 1692): *Wasa'il al-shi'ah*.
- Muhammad Baqir Al-Majlisi (d. 1698): *Bihar al-anwar*.

In the chapter dedicated to the Koran, we pointed out the quarrel between the Sunnites and the Shi'ites concerning the suppression of some verses from the Koran. The quarrel is even more acute in what concerns the hadiths of Muhammad. As a general rule, each of the two groups limits itself to quoting only its own collections, accusing the other of having invented some hadiths attributed to Muhammad in order to support its political views.

In addition to the collections which assemble the hadiths, it is necessary to mention the biographies of Muhammad which constitute an important source of information for a better understanding of the Koran and the *Sunnah* of Muhammad. Among these biographies we quote notably:

- Ibn-Ishaq (d. 768): *Al-sirah al-nabawiyyah*, of which only a part reached us.
- Al-Waqidi (d. 822): *Al-maghazi*.
- Ibn-Hisham (d. 834): *Al-sirah al-nabawiyyah*. The work is based on the one of Ibn-Ishaq.
- Al-Tabari (d. 923): *Khulasat siyar sayyid al-bashar*.

3) Analysis of the *Sunnah*

A *Sunnah* is essentially composed of two parts: the *isnad* (or *sanad*) and the *matn*.

The *isnad*, literally the support, is a chain of transmitters (*rawi*), the channel by which the hadith reached the final transmitter: 'A' narrated according to 'B', and this one heard from 'C', who heard from 'D' etc. As for *matn*, it constitutes the text of the narration itself.

Jurists demand of the transmitter:¹

- The capacity to conceive (*ahliyyat al-tahammul*): it is attributable even to the teenagers, as many hadiths have for source under-age companions of Muhammad. Some put as lower age limit five years. Others advance individual criteria, accepting hadiths of a narrator who knows how to distinguish between an ass and a cow. Finally, others demand that the narrator be of the age to understand the meaning of the message.
- The capacity to transmit (*ahliyyat al-ida'*): the narrator must be a Muslim, mature, mentally sound, equitable and capable of maintaining the hadith from reception to transmission.

Different forms were used to characterize the mode of transmission. The reporter can say: "I heard from," "Such a person narrated to us," "According to such a person," "I found in a book" etc. Each of these forms, often abridged in the text, has a particular value, the most common being "I heard from." The narrator must, to this effect, use the appropriate form, conforming to the reality in order not to mislead the public.

The narration, preferably, must be transmitted literally. But it is also acceptable that it be worded according to meaning, on condition that it is well understood.

The demand for the conditions to be fulfilled by the transmitters rendered necessary the development of the biographical science called '*ilm al-rijal*' (the science of men) or '*ilm al-tabaqat*' (the science of layers). Several works were dedicated to this. They contain the date of birth and death of people, in order to know if they may have encountered those cited. They also study their characters, their works, their masters and their disciples, their honesty and their capacity to give testimony according to rules of Islamic law.

The critical study of which the transmitters of narrations are the object is called in Islamic law *al-jarh wal-ta'dil* (lesion and correction). Transmitters are classified as: "worth of trust," "no objection against him," "is not a liar," "easy in narrating," "liar," etc.² Some honorific titles have also been attributed to them, according to their degree of knowledge: *muhaddith* (narrator), *hafidh* (memorizer), *hujjah* (reference) and *hakim* (governor). The last title is the most elevated degree; it is conferred upon authors of the first five Sunnite collections (with the exception of Ibn-Majah) and some other people. The most elevated among them is called *Amir al-mu'minin* (Emir of the believers), a title given to Malik (d. 795) and to Al-Bukhari (d. 870).

¹ Al-Khatib: *Al-wajiz*, p. 198-202.

² Muslim authors have found a justification for such attacks, often libellous, of verse 106/49:6 "O you who believed! If a perverse comes to you with news, inquire lest you harm a people in ignorance and afterward you regret what you did" 106/49:6.

Apart from studies related to the narrators, other studies were dedicated to the explanation of incomprehensible terms (*gharib al-hadith*), too contradictory or difficult to understand hadiths (*mukhtalaf al-hadith wa-mushkiluh*), to the abrogation within the hadiths (*nasikh al-hadith wa-mansukhuh*) and to the circumstances around which the narration came into existence (*asbab wurud al-hadith*). The analysis of the content itself of the hadiths is less developed, since it implies putting into question the word of Muhammad which is always surrounded by sacredness. If one could put into question the authenticity of a narration because of its content, one would be tempted to do the same with the Koran. But there are some interesting elements on this level in the detection of apocryphal narrations. For these hadiths, one proceeds with the analysis of the chain of the transmitters. Then one tries to find within the hadiths some background imperfections. The weakness of the language of a hadith, its sense contrary to reason, even common sense, and the exaggeration, could indicate that the hadith was invented. The same applies when a hadith enters into conflict with the Koran, with a hadith held to be authentic or with historical data.¹ The absence of a rigorous analysis of the content resulted in the subsistence in the collections of doubtful hadiths considered authentic. In spite of that, a contemporary author, Abu-Shahbah, sees a mystery in the non-subjection of the hadiths, as extravagant as they may be, to in-depth analysis. He explains:

- A hadith can have an equivocal meaning. In this case, the rational criteria cannot address it. God alone and his Prophet can grasp the meaning. One has the choice between believing it without asking questions or interpreting it in order to render it conform to reason or to a tradition transmitted in a clear manner.
- A hadith can have a figurative meaning. Also in this case it is not possible to subject it to reason or to common sense.
- A hadith can have a secret sense which only a later science can unveil. Such a hadith is a prodigy of revelation.²

4) Classification of the *Hadiths*

Specialists of *Sunnah* have established several classifications, going to up to 65 categories for Ibn-al-Salah (d. 1245). We present the most essential.

A) *Hadiths attributed to God or to Muhammad*

The hadiths in their greater majority are attributed to Muhammad, originating either from the intellectual effort of Muhammad or from revelation. For this reason, they are called *ahadith nabawiyyah* (prophetic narrations). A certain number of hadiths, ranging from 400 to 1000, are attributed by Muhammad to God; they are called *ahadith qudsiyyah* (holy narrations). In these hadiths it is God who speaks to men, in first person, by the intermediary of Muhammad. This type of hadiths is introduced as follows: "God said in what the Messenger of God reported from him." Then follows the hadith in question. As a matter of example, God said to Muhammad:

¹ For more information on these questions, see Al-Khatib: *Al-wajiz*, p. 422-427.

² Abu-Shahbah: *Difa'*, p. 49-52.

O my servants, I have forbidden myself injustice, do not be unjust; O my servants, every one of you is in error unless I guide you on the right path. Ask me to be guided, and I will guide you.

I am the merciful (*rahman*), and this is the matrix (*rahm*) to which I gave a name that derives from mine. He who establishes the relationship with his parents, I establish the relationship with him, and he who cuts the relationship with his parents I cut my relationship with him.

Holy hadiths concern more moral than juridical norms. They are exhortations to virtue and to good morals, and a call to the respect of the divine order.

The difference between such hadiths and the Koran is that the latter was revealed as much in its content as in its form, whereas the formulation of the holy hadiths was left to Muhammad.

The fact of not believing in a holy hadiths does not constitute a sin of disbelief (*kufir*), a transgression of faith, unless it be about a recurring hadith (see the following point). One cannot use a holy hadith in prayer and its recitation does not procure any merit. It does not share in the miraculous character and the inimitability attributed to the Koran. Finally, there is nothing wrong with touching or reading a collection of these hadiths if one is not ritually purified, contrary to the Koran.

Today, one finds separated collections of holy hadiths which attribute to the latter a particular position with regard to the other hadiths.¹

B) The recurring hadiths (ahadith mutawatirah)

Some hadiths were transmitted by several narrators among the companions of Muhammad, repeated by a good number of followers and the followers of the followers, which rendered impossible their connivance to propagate falsehood or to accredit falsity. The number of the transmitters varied between four and forty, according to Muslim authors. The multiple and continual transmission implies the veracity of their subject, giving the hadith an absolute value. In that case, one would speak of repeated, recurrent hadiths, transmitted by irrefutable testimony (*hadith mutawatir*).

Recurrent hadiths can be repeated to the letter, word for word, or according to the meaning. A notable part of this category of the narrations is concerned with facts related to Muhammad which a multitude of people may have recorded, such as his way of performing ablutions, prayer, fasting and accomplishing the pilgrimage. Among such hadiths the following can be cited: "He who lies with regard to me, may he have his seat in fire."

Recurrent hadiths are considered to be authentic. They determine imperative norms which a Muslim should not put in doubt. He who rejects a recurrent hadith, whilst having the certitude that it is a question of a recurrent hadith, is considered a disbeliever (*kafir*). But this type of hadiths is rare, according to Muslim authors. Al-Suyuti (d. 1505) thinks that their number does not go beyond a hundred.²

¹ See, for example: *Al-ahadith al-qudsiyyah* in 2 volumes (the work contains 400 Holy Hadiths); Al-Samirra'i: *Al-ahadith* (the book contains 1000 Holy Hadiths); Al-Masri: *Al-ahadith*.

² *Mawsu'at 'ulum al-hadith al-sharif*, p. 302-306.

C) The famous hadiths (ahadith mashhurah)

They are hadiths reported from the Prophet by a number of companions not exceeding two or three, but which are not transmitted by a big number of trustworthy narrators belonging to the following and successive generations. It is sure that the hadiths originated from such illustrious men, but it cannot be affirmed in an absolute manner that they originated from the Prophet himself. Their probing force is therefore less than that of recurring hadiths, even if jurists accord them the same value as the latter. In this category are to be found hadiths transmitted by the Caliphs Abu-Bakr (d. 634) and 'Umar (d. 644) or by 'Abd-Allah Ibn-Mas'ud (d. 652). Among the famous hadiths can be cited: "Acts depend on the intention, and to every person according to his intention;" "It is forbidden to take for second wife the niece of the first wife."

D) The unique hadiths (ahadith ahadiyyah)

Unique hadiths are those which are neither recurrent nor famous, reported by one or two companions of Muhammad and one or two of the followers, even if, later, the hadiths were often cited. According to Khallaf, the majority of the hadiths assembled in the collections of the *Sunnah* belong to this category.¹

Such hadiths pose a problem. Kharijites and Mu'tazilites are of the opinion that they cannot be taken into consideration, as they do not provide sure knowledge. In this regard, the following Koranic verse is often cited: "Do not follow that whereof you have no knowledge" (50/17:36).

Malik (d. 795), Ahmad Ibn-Hanbal (d. 855) and Ibn-Hazm (d. 1064) are of the contrary opinion. In support of their opinion, they cite the verse: "The believers do not have to mobilize all together. If only a number of every group of them mobilized in order to understand the religion and to warn their people when they return to them! Maybe they beware!" (113/9:122). And yet, the verse permits following the science of "a few." They also quote the verse: "O you who believed! If a perverse comes to you with news, inquire lest you harm a people in ignorance and afterward you regret what you did" (106/49:6). And yet, the verse demands to verify the information of the wicked person, whereas they would take into account information reported by an equitable person without verification. They also evoke the fact that Muhammad had accepted the testimony of a Bedouin who had spotted the moon for the announcing of the beginning of the fasting of the month of Ramadan, and that the companions of Muhammad had unanimously accepted, in many cases, the unique hadiths.

Due to the mistrust inspired by such hadiths, jurists have tried to impose some conditions, demanding, for example, that they should not be contrary to the practice in Medina, that they should concern only rare events, that they should not be contrary to rules of reasoning by analogy (*qiyas*), that the transmitter should not do the contrary of what he says, etc.

An important example of unique hadiths is the one which foresees the death penalty for apostasy; liberal authors refuse to take this into consideration today.

¹ Hallaf: *Les fondements*, p. 62.

E) Hadiths going back to Muhammad, interrupted or free

Hadiths can have a chain of continuous and known transmitters going back to Muhammad. One speaks in that case of *hadith marfu'* (a hadith attributed to the Prophet). But some hadiths do not benefit from such a transmission, one or several reporters among the companions proving to be defective. One speaks in that case of hadith *maqtu'* or *mawquf* (related to the *Sahabah* or related to the *Tabi'un*). Some totally neglect the mentioning of the intermediary companions. Thus, when Hasan Al-Basri (d. 728) would listen to a hadith of a companion, he would mention it, but when he listened to a hadith of several companions, he would content himself with saying: "Muhammad says." We have here the name of the follower, but not that of the companion who reported from Muhammad. One speaks then of *hadith mursal* (autonomous hadith). The jurists generally consider that free hadiths are weak (*dha'if*) and are not taken into consideration because they are not verifiable, unless the transmitter be trustworthy. Abu-Yusuf (d. 798) bases himself on a hadith saying that the buyer and the seller can mutually nullify the sale as long as the session during which the sale was concluded has not been dissolved. Abu-Yusuf does not tell us who gave the testimonies and who reported the narration and yet more than one and a half centuries separate Abu-Yusuf from the Prophet.¹

F) Literal and summary Sunnah

Muslim authors distinguish between the hadiths which are reported to the letter, in a complete manner, and the hadiths reported according to the meaning.

G) Authentic, good, weak or falsified Sunnah

On the basis of the analysis of the chain of transmission, Muslim authors have classified hadiths according to their acceptability. Hadiths are considered:

- Authentic (*sahih*): while they are perfectly sound, without any defect in their chain of transmission;
- Good (*hasan*): when they contain slight imperfections in their chain of transmission;
- Weak (*dha'if*): when the chain of transmission is remarkably defective, etc.

Authentic hadiths are classified into seven categories according to their sources: 1) those retained by Al-Bukhari and Muslim; 2) those retained by Al-Bukhari alone; 3) those retained by Muslim alone; 4) those retained neither by one nor by the other, but which fulfil the conditions requested by the two authorities; 5) those fulfilling the conditions of Al-Bukhari; 6) those fulfilling the conditions of Muslim; 7) those considered sound according to other sources.

Some hadiths are discredited and bear the name of falsified or invented hadiths (*hadith mudallas* or *mawdu'*), either in their content, or in their chain of transmission. The one who falsifies a hadith commits a sin. The same goes for the one who cites it, unless he indicates that it is a falsified one. Muhammad in fact said: "He who lies about my name is not like the one who lies about others. He who lies

¹ Savvas, Part II, p. 264-264.

about me voluntarily, will have his place in the fire." These hadiths, to which many works have been dedicated, were invented for different reasons:

- People who had infiltrated Islam were trying to create troubles through totally invented hadiths.
- Different political and philosophical trends benefited from the originators of the hadiths in order to support their positions.
- Tribal, national, racial or ethnic chauvinism: some hadiths praised the Arab race. Other nations responded with other hadiths to attack them or to compete with them. One hadith says: "The worst of the languages for God is the Persian language. As for Arabic, it is the language of the Paradise." They retorted: "When God was angry he made the revelation in Arabic and when he was happy he did it in Persian."
- Begging: some narrators, to enliven the public and satisfy its curiosity, did not hesitate to invent the strangest hadiths. Like for the exegeses of the Koran, Muslim authors see in them Jewish accounts.
- White lies: some mystics or Sufis used to invent some hadiths to urge people to follow the path of good, thinking this was well. When they were reproached of lying they would answer that the lie was in favour of the Prophet and not against him.¹

II. *Sunnah*, the second source of law

Sunnah is considered to be the second source of Islamic law. Muslim jurists had to legitimize the recourse to this source, as they did for the Koran and the other sources of which we shall speak later.

1) Legitimacy of the recourse to the *Sunnah*

A) *Arguments drawn from the Koran*

In many verses the Koran puts obedience to God and to his Prophet on the same level. We mention the most important among these:

Say: "Obey God and the messenger." But if they turn the back, [...] God does not love the disbelievers! (89/3:32).

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

No! By your Lord! They will not believe until they make you judge in what they litigate with each other, do not find in themselves any blame from what you decided, and submit completely (92/4:65).

Whoever obeys the messenger, obeys God (92/4:80).

It is not for a believer man or woman, when God and his messenger have decided on a matter, to claim freedom of choice in their matter: whoever disobeys God and his messenger is manifestly misguided (90/33:36).

¹ Al-Ahdal: *Mustalah*, p. 167-175.

Whoever obeys God and his messenger, he will enter him gardens underneath which the rivers run. Whoever turns the back, he will punish him with a painful punishment (111/48:17).

Take what the messenger gave you, abstain from whatever he forbade you, and fear God. God is severe in punishment! (101/59:7).

Your companion is not misguided, nor was he misled. He does not speak out of desire. It is but a revelation that is revealed! Taught him who is strong in power, endowed with energy. He then redressed himself when he was in the highest horizon. Then he neared and hung suspended. He was at the distance of two bows, or nearer. He then revealed to his servant what he revealed. The heart did not belie what it saw (23/53:2-11).

In the last quoted passages, it is a question of the revelation transmitted by the angel, but Muslims truncate the passage by citing only the part in italics to conclude that the whole of the behaviour of Muhammad was dictated by revelation and, therefore, must be followed on the same level as the Koran. The difference between the Koran and the *Sunnah* of Muhammad is that the latter is revealed only on the level of meaning and not on the level of formulation. Yet, if the Koran is obligatory, by the very fact that it flows from God, the same applies to the sayings of Muhammad, by the very fact that their meaning comes from God too. To these arguments, Muslims add that God entrusted his Prophet with the function of explaining the meaning of the Koran and to interpret its pithy norms:

We descended to you the remembrance, so that you show to the humans what was descended for them. Maybe they think! (70/16:44).

The explanations of Muhammad are therefore complementary to the Koran and necessary for the understanding of its norms.

B) Arguments drawn from the Sunnah

Muslims quote many hadiths of Muhammad which impose on them the duty to follow his orders and to imitate his example. We quote some:

I recommend you to fear God and to obey your governor even when he is a slave. He who will live among you will see many divergences. Be steadfast in observing my tradition and the tradition of the perceptive Caliphs, hold them tightly between your teeth and watch against innovations, because every innovation is a heresy, and every heresy is perdition, and every perdition is in hell.

It will come to pass that one of you will sit on his sofa, listening to my hadiths and saying: between you and me there is the Book of God; what it considers licit shall be so for us; and what it considers illicit shall also be so for us. Yet, what the messenger of God considers illicit is similar to what God has rendered illicit.

I left you two things after which you shall never go astray: the Book of God and the *Sunnah* of his Prophet.

They also evoke the hadith of the nomination of Mu'adh Ibn-Jabal (d. 639) whom Muhammad asked how he expected to judge. He answered: "I will judge according

to the Book of God, and if I find nothing therein, according to the *Sunnah* of his messenger." Muhammad then approved of his response.

C) Arguments drawn from consensus

Since the time of the Prophet, Muslims have been unanimous in saying that it is necessary to implement the *Sunnah* and to refer to it in order to know what behaviour to embrace.

During the time of Muhammad, his companions used to conform themselves to his judgments and used to obey his injunctions. In this regard, they were not distinguishing between orders coming from the Koran and those coming from Muhammad. Their attitude was illustrated by the above mentioned response of Mu'adh.

After the death of Muhammad the companions and the followers used to turn to the *Sunnah* to look for solutions to events or situations over which the Koran was silent. Thus, when Abu-Bakr (d. 634) was confronted with a case over which the Koran was silent and ignored the opinion of Muhammad, he used to ask if there was among the Muslims someone who knew how Muhammad would have dealt with such a case. 'Umar (d. 644) used to do the same as well as all those among the companions who assumed the role of *mufti* or judge. The recourse to the *Sunnah* was necessary because the Koran could not be understood on its own and because it prescribed norms without entering into modalities.

D) Rational arguments

Muslim jurists say that if Muhammad is accepted as the Messenger of God, it is inconceivable not to believe his message. One cannot imagine the possibility of obeying God whilst being opposed to Muhammad.¹ Denying recourse to the *Sunnah* would be putting into question the infallibility of Muhammad. God could not have given support to a personality of whom he disapproved his acts and words.² This leads us to the concept of infallibility.

2) Infallibility of the Prophet

A) The basis of infallibility

We have seen in the chapter dedicated to the Koran how Muslims have derived its sacred character from the fact of it coming from God, an origin proved by its inimitable character, a fundamental concept in the philosophy of Islamic law.

The *Sunnah*, as a second source of Islamic law, poses another problem: the infallibility (*'ismah*) of the prophets in general, and of Muhammad in particular. One can only follow the teachings of a prophet if one arrives at the conclusion that this prophet speaks the truth.

Infallibility is defined as "the power that stops man from committing sin and from making mistakes." It is attributed by God to a man who yet remains free to accept it or to reject it, without being able to do so! The contradiction in terms would be like a father who acquired the gift of tenderness towards his son and who, whilst being capable of killing him, would never kill him for anything on earth.

¹ Zaydan: *Al-wajiz*, p. 162-163.

² Al-Hakim: *Al-usul*, p. 128-129.

It seems that the concept of infallibility was forged by theologians of the 9th and 10th century. In fact, the concept is not found as such in the Koran or the *Sunnah*, even though the term *'ismah*, under its different forms, is nonetheless used 13 times in the Koran, as well as in some collections of the *Sunnah*, to designate protections. The most important verse is the following:

Seek protection (*i'tasimu*) with God's rope all together and do not separate. Remember God's favour on you. When you were enemies, he rallied your hearts. So by his favour you became brothers. You were at the brink of a pit of fire, and he saved you therefrom. So God manifests for you his signs. Maybe you be guided! (89/3:103).

Muslim jurists, however, are fond of the concept of the infallibility of Muhammad and the other prophets in line with different Koranic verses:

Your companion is not misguided, nor was he misled. He does not speak out of desire. It is but a revelation that is revealed! (23/53:2-4).

The heart did not belie what it saw... The view did not deviate, nor transgress (23/53:11; 17).

We gave him Isaac and Jacob; each did we guide. We guided Noah before, and of his descendants, David, Salomon, Job, Joseph, Moses and Aaron... And Zechariah, John, Jesus and Elijah... And Ismael, Elisha, Jonah and Lot. We favoured each of them above the world. And some of their fathers, their descendants and their brothers. We chose them and guided them to a straight path. That is God's guidance wherewith he guides whoever he wishes of his servants. But if they had associated, that they were doing would have been vain. Those are they to whom we gave the book, the wisdom and the prophecy. If these disbelieve therein, we confide them to people who are not therein disbelievers. These are they whom God guided (55/6:84-90).

[Iblis] said: "My Lord! Since you misled me, I will adorn for them [the life] on the earth and will mislead them all, except your devoted servants among them" (54/15:39-40).

B) Limits of infallibility

Muslims classify acts of prophets into two categories: those accomplished before their call by God and those accomplished after their call. In other words, those accomplished before the prophecy and those accomplished after. Only the acts committed voluntarily after the prophecy would be covered by infallibility. But some go as far as believing that even their involuntary acts would be infallible.

Muhammad was exempt of this classification, his entire life was covered by infallibility. Nonetheless, Muslim doctrine affirms that a *Sunnah* which involves worldly matters cannot have the value of norm and no one is bound to follow it. Thus, when Muhammad settled in Medina, he noticed that the villagers were practicing artificial pollination of their palm trees and he forbade them the practice. They obeyed him, but the harvest of that season was less. Muhammad then told them: "In this case, pollinate your palm trees. You know better than me in matters regard-

ing your profane life."¹ The hadith is exploited today by those who wish to see more autonomy in Islamic law.

Infallibility would not also cover acts of Muhammad related to his human nature (his manner of eating, drinking, sitting, etc.); these acts cannot constitute obligatory norms. It was the same for the organization of the army, military expeditions and commercial affairs related to human experience and not to revelation. Thus, when Muhammad decided during the battle of Badr (in 624) to station his army in a particular place, a companion asked him whether that was dictated by revelation. Having negatively responded, the companion advised Muhammad to proceed differently. On the juridical level, his manner of appreciating the proofs is not infallible; on the contrary, the necessity to have the proofs is considered revealed and therefore obligatory.

Doctrine adds that attitudes which are prerogatives reserved by the Koran to Muhammad concern him alone and cannot be extended to all the Muslims. Thus, the Koran allows Muhammad to have as many wives as he would like (90/33:50), whereas Muslims must limit themselves to four (92/4:3). It allows him to have sexual relations with his wives during the hours of fasting in the month of Ramadan, an act forbidden to the other Muslims (87/2:187). It imposes on him duties of which other Muslims are exempt, such as prayer during the night in virtue of the verse: "And stay awake for a supererogatory prayer during part of the night for yourself. Maybe your Lord will raise you to a praised stand" (50/17:79).

There exist therefore norms with an obligatory character for the believers and others restricted to Muhammad. The acts and sayings of the latter which do not enter into these two categories remain the domain of what is allowed, the believer being free to take the example of the Prophet in virtue of the verse: "You have in God's messenger a good model, for whoever hopes for God and the last day and remembers God much" (90/33:21).²

3) Function of the *Sunnah*

The *Sunnah* is connected to the Koran as a source of legitimization and complementarity. In this regard there are four distinct situations in its rapport to the Koran:

A) Confirming norms contained in the Koran

This simply concerns reiteration of Koranic norms. It is the case for the hadiths which affirm the obligatory character of prayer, legal charity, fasting and pilgrimage and those which condemn polytheism, false witness, disobedience and assassination of the parents.

B) Clarifying the meaning of some Koranic norms

This flows from verse 70/16:44 quoted above. The *Sunnah* is considered the best way of understanding the Koran. Umar (d. 644) said: "People will come to discuss with you concerning equivocal verses of the Koran. Answer them by having recourse to the *Sunnah*, for the People of the *Sunnah* are more knowledgeable about the Book of God."

¹ Sahih Muslim, hadith 2363.

² Hasab-Allah, p. 69-71.

It was said to Mutarrif Ibn-'Abd-Allah (d. 706): "Speak to us about the Koran only." He answered: By God, we do not by any means look for an alternative to the Koran, but we look at who knows better than us the Koran."

When he sent 'Abd-Allah Ibn-'Abbas (d. 686) to the Kharijites, the Caliph 'Ali (d. 661) recommended him not to discuss with them by invoking the Koran, for the Koran can have different meanings (*hammal awjuh*), but to discuss with them using the *Sunnah*. The Kharijites considered an apostate, and therefore deserving death, whoever committed a grave sin. They were told that Muhammad had stoned to death an adulterous person, put to death an assassin in virtue of the law of retaliation and cut the hand off a thief; in spite of that he used to bury and pray over them without excommunicating them from the Muslim community.

Clarification can fulfil three functions: detailing, restricting or specifying:

- Detailing: the Koran prescribes prayer, but without precisising the times, the preparation and the modality. These elements have been fixed by the *Sunnah*. Similarly, the Koran says: "Observe the prayers and [especially] the middle prayer; and stand devoutly for God" (87/2:238). The *Sunnah* came and added the prohibition of speaking with one another during prayer as being part of piety.
- Restricting: the Koran prescribes amputation of the hand of the thief (112/5:38). The *Sunnah* came and stated that the amputation must be done on the level of the wrist. Similarly, the Koran prescribes accomplishing the circumambulation of the Ka'aba (103/22:29), the *Sunnah* came and demanded that it be done in a state of purity. The Koran fixed the parts of inheritance after the execution of testamentary legacies (92/4:11 and 92/4:12), the *Sunnah* came and restricted the power of the *de cuius* in bequeathing his goods to a third-party. The Koran established a list of next of kin with whom it is forbidden to marry, allowing marriage with those that are not mentioned (92/4:23-24), the *Sunnah* came and added other people to the list, among whom the maternal and paternal aunt of the previous spouse or her niece. Similarly, the Koran contains norms related to dietary prohibitions. Many hadiths of Muhammad complete or explicate these prohibitions. Thus, Muhammad prohibited eating meat of certain animals: "It is forbidden for you to consume meat of the domesticated donkey and that of any canine species among the ferocious animals (*siba'*).". Similarly, he prohibited the consumption or the use of parts of licit animals. Hence, the consumption of the urine of animals is forbidden, with the exception of that of the camel, which Muhammad considered to be medicinal.
- Specifying: the *Sunnah* may consist in establishing a special norm with regard to a general Koranic norm. For instance, the Koran establishes norms relative to succession, but the *Sunnah* came and exempt from these norms prophets (among whom Muhammad) whose goods would not be distributed among the heirs but given out in charity. Similarly, the Koran accords to the son a part in the heritage, but the *Sunnah* came and excluded the son who makes an attempt against the life of his ascendant. In what concerns the next of kin with whom it is forbidden to get married, the *Sunnah* came and added milk kinship which is

put on the same level as the natural kinship. The Koran permits sales contracts (87/2:275), but the *Sunnah* forbade some of these forms.

C) Establishing norms not mentioned in the Koran

The above mentioned examples demonstrate that the *Sunnah* introduced norms not contained in the Koran.

Nonetheless, Muslim authors consider that the *Sunnah* does not add anything new that would not be rooted in the Koran and that if we do not succeed in associating some of the norms mentioned in the *Sunnah* with the Koran, it is due to our incapacity to find the connection. Consequently, they endeavour to find such a connection. By way of example, the prohibition of the meat of a domesticated donkey and that of any canine species among ferocious beasts is attached to the Koranic verse: "He exhorts them to be righteous, enjoins them from evil, allows for them all good food, and prohibits that which is bad" (7:157). With regard to this Khallaf writes:

The Prophet had perfectly assimilated the spirit of Koranic laws and their prescriptions were either the result of analogical reasoning with regard to the Koran, or the result of the application of Koranic principles and rules to the case in point.¹

D) Abrogating some Koranic norms

Logically speaking, one should conclude from the above-given examples that some hadiths of Muhammad contradict or, to use a juridical terminology, abrogate Koranic verses. But Muslim authors are opposed to such an affirmation and insist on the idea that never would an authentic *Sunnah* enter into conflict with the Koran and that, should there be any contradiction, one should have recourse to an interpretation aiming at reconciling them. Muslim sensibility does not seem justifiable to us from the moment that Muslim authors admit that abrogation is affirmed within the Koran itself, that some later verses abrogate those anterior. If one admits that the Koran and the *Sunnah* constitute together one revelation, one does not see why the *Sunnah* would not abrogate the Koran. One famous case is that of verse 102/24:2 which says:

The fornicatress and the fornicator, you shall lash each of them one hundred lashes. Let not pity for them detain you in God's religion, if you believe in God and the last day. Have a group of the believers witness their punishment.

Yet, the *Sunnah* foresees stoning to death against such an offence. To circumvent the problem, 'Umar (d.644) had to have recourse to mental acrobatics by pretending that stoning to death was mentioned in the Koran, but it was suppressed from the Koranic text without being abrogated. Those who challenge the recourse to the *Sunnah* consider on the contrary that the sanction for adultery is flagellation as it is the penalty mentioned in the Koran. We shall come back to this controversial question when we shall speak about abrogation.²

III. *Sunnah* put into question

The questioning of the *Sunnah* is based on two principal reasons:

¹ Hallaf: *Les fondements*, p. 60.

² See Part III, chapter I.1.5.

- There is above all the difficulty to authenticate the veracity of these hadiths. Admitted by Muslim authors themselves, the distinction between what is authentic and what is apocryphal remains a very difficult task, more so when one comes across invented hadiths quoted by jurists, biographers of Muhammad and some commentators. Several works dedicated to such invented hadiths warn the public against their malfeasances.¹
- Then, there is the exclusive adherence to the text of the Koran, considered to be sufficient in itself. The Koran says in this regard:

Today, I perfected for you your religion, and fulfilled my favour upon you (112/5:3).

We did not neglect anything in the book (55/6:38).

We descended on you the book, as manifest [explanation] of everything, a way, a mercy and an announcement to the submitters (70/16:89).

Muhammad himself was confronted with the problem. When he gave orders, some of his adepts used to answer back that they did not want to hear about anything else since the Koran itself did not contain such an order. The problem remained even after his death. Some would totally reject any recourse to the *Sunnah*. Al-Shafi'i (d. 820) dedicated to this question a chapter entitled "Those who reject the whole of the tradition" in his book *Kitab al-um*. He responded to them that many passages from the Koran are incomprehensible or inapplicable without the explanations of the *Sunnah*. It is the case for the prayer prescribed by the Koran but for which the details are found in the *Sunnah*.

Against the trend of total rejection, there was the one that rejected the traditions that were not convenient for it, judged partisan or less reliable in origin. Hence, one has to make a selection. The selection can be the task of the collector himself, as was the case for Malik who each year carried out an elimination of a series of hadiths (without giving any justification) of his *Muwatta'*, passing thus from around ten thousand hadiths to a few hundred. It can also be the work of critics who criticize even the most respected collections.

The *Sunnah* is more and more contested today in Muslim countries. One of its most principal critics is the Egyptian Rashad Khalifa, an agricultural engineer, doctor and chemist, founder of the group *Submission*, imam of the Tucson Mosque, translator of the Koran into English, famous protagonist of the number 19 of the Koran and the self-proclaimed messenger of which may have been question in the Koranic verse: "and then comes to you a messenger confirming what is with you" (89/3:81).²

Rashad Khalifa considers that "Hadith and *Sunnah* have nothing to do with the prophet Muhammad, and that adherence thereto represents flagrant disobedience of

¹ Al-Ahdal gives a list of 12 works (Al-Ahdal: *Mustalah*, p. 185-186).

² For more information about him, see <http://www.submission.org/khalifa.html>.

God and His final prophet." For him they are "Satanic innovations."¹ They must be rejected in virtue of the Koran which says:

These are God's signs which we recite to you with the truth. After God and his signs, in what narration will they believe? (65/45:6-7).

Khalifa considers that hadiths are falsified texts unjustly attributed to Muhammad by people who had never seen the Prophet, like the first collection of the *Sunnah*, the one of Al-Bukhari (d. 870), who was born more than 200 years after the death of Muhammad.²

Khalifa further adds that Muhammad was obliged to transmit only the Koran (51/10:15-18), the only source for religious teaching (55/6:19). Attaching to the Koran other sources would be similar to attaching to God another divinity (50/17:39).³ By following the hadiths, one deifies Muhammad who, according the Koran, is nothing other than a human being (69/18:109-110 and 61/41:6).⁴

Some people claim that the hadith and *Sunnah* are divine revelations. Obviously, they are not aware that the criterion of divine revelation is perfect preservation (54/15:9). Since the so-called hadith and *Sunnah* of the Prophet have been vastly corrupted, they can never meet the criterion of divine revelation. It is an acknowledged fact that the vast majority of hadiths are false fabrications. "The blasphemy is evident when they claim that hadith and *Sunnah* are divine revelations. Do they not realize that God Almighty is capable of preserving His revelations?"⁵ The Koran is a detailed and complete text, whereas the majority of Muslims have been duped into following the conjecture known as hadith and *Sunnah*. Khalifa quotes in this regard the verses 55/6:114 and 23/53:23.⁶ He points out two hadiths according to which Muhammad may have forbidden his companions to write anything else other than the Koran.⁷ Khalifa opposes "the best hadith" which constitute the Koran (according to verse 59/39:23) from the narrations which serve to mislead others away from the path of God (according to verse 57/31:6).⁸ For him the hadiths of Muhammad are Satanic fabrications aimed at diverting people from the path of God.⁹ He cites as an example verse 40/72:18 according to which one should not pronounce, during the prayer, anything other than the name of God. And yet, the Muslim masses today follow the innovations that dictate upon them the praising and glorifying of Muhammad and Abraham, while praying to their Lord.¹⁰ Furthermore, hadiths go against the Koran. For example, the Koran only foresees the

¹ Khalifa: *Quran, hadith and islam*: <http://fr.feedbooks.com/userbook/6007.pdf> preface and p. 15. He cites Koranic verses 55/6:112 and 42/25:31 according to which God "made for every prophet an enemy: Satans [from among] the humans and the djinns" and "made for every prophet an enemy from the criminals."

² *Ibid.*, p. 39.

³ *Ibid.*, p. 6.

⁴ *Ibid.*, p. 10-11.

⁵ *Ibid.*, p. 8.

⁶ *Ibid.*, p. 8.

⁷ *Ibid.*, p. 17-18.

⁸ *Ibid.*, p. 27.

⁹ *Ibid.*, p. 39.

¹⁰ *Ibid.*, p. 38.

flogging of the adulterer (102/24:12), but overcome by tradition, and Satan's influence, the "Muslim" scholars instituted "stoning to death" as the punishment for married adulterers.¹

Khalifa goes as far as making the link between the acceptance of the *Sunnah* and military defeats. The Quran teaches unequivocally that victory is guaranteed for the Muslims (84/30:47; 60/40:51; 103/22:38; 95/47:7). The defeats of Muslims in history started with the introduction of the *Sunnah*. Thus, three million of Israelites have beaten 150 million Arabs, the Muslims of Pakistan were defeated by India and those of Afghanistan by the Russians, etc. All that due to the fact that Muslims refuse to believe that the Koran is the only source for the religion. The Koran says: "As for the one who disregards My message, he will have a miserable life (45/20:124)."²

Let us quote for the last time a text of the author:

As stated in Quran (77/67:1-2 and 67/51:56) we were created for the sole purpose of worshiping God alone. Satan wanted to be a partner with God; a god beside God. Consequently, God created Adam to expose Satan's rebellious ideas. And God created us to show Satan, and all the angels that we can worship Him alone, without need for any partners. [...]. When we seek "religious" instructions from Muhammad, or any other source beside God, we support Satan in his claim that God needs a partner. Therefore, those who worship God alone follow the instructions and teachings of God alone.³

The position of Khalifa could not but unleashing passions against him. He was declared apostate by Ibn-Baz (d. 1999)⁴ and was assassinated by his coreligionists at the exit of a mosque on 31st January 1990.

We shall see later on⁵ that criticism of the *Sunnah* is undertaken by current Muslim thinkers who are opposed to the application of Islamic law.

Chapter III.

The *Sunnah* of the companions of Muhammad

After the death of Muhammad, a certain number of his companions took care of *fiqh*, giving *fatwas* to the Muslims or functioned as judges. Their decisions were reported in the collections of the *Sunnah* of Muhammad or in separate collections. But what was the normative value of their decisions? In this regard, the first question asked is that of determining the companions of the Prophet.

¹ *Ibid.*, p. 38.

² *Ibid.*, p. 36.

³ *Ibid.*, p. 41-42.

⁴ *Majallat al-buhuth al-islamiyyah*, no 9, 1984, p. 39-42. The text of the *fatwa* can be found in http://www.binbaz.org.sa/last_result.asp?hID=903.

⁵ See Part IV, chapter III.III.

I. Determining the companions

Companions of Muhammad number thousands and it is impossible to cite all their names. Abu-Zar'ah Al-Razi (d. 878) proposes the figure of 114,000 companions. And when he was asked who they are, he responded: inhabitants of Makka, Medina and those living between the two towns, some groups of nomads, as well as those who were present during his farewell speech. Several works list the companions. Thus, the historian Ibn-al-Athir (d. 1233) gives names of 7,554 companions in his book *Asad al-ghabah fi ma'rifat al-sahabah* and Ibn-Hajar (d. 1,449) designates 12,267 in his book *Al-isabah fi tamyiz al-sahabah*. The companions are classified into 12 categories according to precedence in their adhesion to Islam and their participation in the battles of Muhammad. The classification is based on the following verse:

Are not equal those of you who spent and combated before the conquest. Those are greater in degree than those who spent and combated after (94/57:10).

The best of the companions are the first Caliphs: Abu-Bakr (d. 634), followed by 'Umar (d. 644) (except among the Shi'ites), followed by 'Uthman (d. 656), followed (or preceded for some) by 'Ali (d. 661). The last of the companions died in the year 718 or 729.

Muslims were also interested in the followers (*al-tabi'un*) of the companions and the followers of the followers who, evidently, are innumerable. They are part of the chains of the transmission of the hadiths and it was important to identify them. It concerns people who had contact with the companions of Muhammad. The followers were dispersed in all the regions conquered by Islam. The year 765 constitutes the date limit for the followers of the companions and the year 835 the date limit for the followers of the followers. The compilers of the narrations look for support from the three categories: companions, followers and followers of the followers to determine the chain of transmission. The narrators coming after the three categories comprise a group to be scrutinized with rigor.

II. Legitimacy of the recourse to the *Sunnah* of the companions

The jurists have motivated the recourse to the *Sunnah* of the companions in the same manner as they did for the *Sunnah* of Muhammad.

Several Koranic verses are cited:

You were the best nation brought forth unto humans. You order the appropriate, forbid the detestable and believe in God (89/3:110).

Thus we have made you a median nation so that you be witnesses over the humans, and that the messenger be witness over your (87/2:143).

The first precursors among the emigrants, the succourers and those who followed them in goodness, God is pleased with them and they are pleased with him (113/9:100).

We remark, however, that the three verses applied to the companions are often quoted as concerning all the Muslims in their totality.

Several hadiths of Muhammad are also cited. He thus said: "the best of friends, are mine, then those who follow them, and then those who follow the latter." He also said: "My companions are like the stars, if you follow one of them, you will find yourself on the right path."

The infallibility attributed to Muhammad was extended to his companions. Ibn-Qayyim Al-Jawziyyah (d. 1351) praises the companions and affirms that were they to make a mistake there would have been no one to tell the truth. It is not allowed to challenge them or to put into question the veracity of their discourse. They are considered equitable (*'adl*), a required condition for the acceptance of the deposition of a witness. The infallibility of the companions ensues from the praise made to them by the Koran in the above-mentioned verses.

The fact that the companions of Muhammad are divided and that they fought among themselves, does not change anything about the veracity of their hadiths. Does the Koran not say: "If two groups of believers combat each other, reconcile them" (106/49:9)? In spite of the fights among them, the Koran continues to call them "believers." The verse is not only of general scope, but it is also interpolated in order to excuse the companions of Muhammad.

The *Sunnah* of the companions of Muhammad, in what concerns its obligatory character, is divided into three categories:

- The positions of the companions over which their accord was incontestable, even when the accord was tacit: It is the case for the verse of stoning to death which 'Umar (d. 644) cited as being part of the Koran, without ever having been part of it. Obeying the companions in this case is an overriding duty (*wajib*) for every Muslim.
- The position of the companions about which it is known with certitude that they were not in accord: Such positions bind only those who emit them. It is, for example, the case for a hadith reported by Zayd Ibn-Khalid according to which noisy laughing destroys the effects of purification by ablution.
- The position of the companions about which it is unknown whether an accord was established or not among the companions: Here, the opinions are divided.

Malik (d. 795) and Ahmad Hanbal (d. 855) largely used this source of law which they considered to be the basis of *ijtihad*. Abu-Hanifah (d. 767), on the contrary, was of the opinion that it was not obligatory to imitate the companions. He used to say: "The companions were a class of good men (*rijal*), we are also a class of good men: they proceeded by effort and we also proceed by effort."

III. The *Sunnah* of the companions put into question

As was the case with the *Sunnah* of Muhammad, the *Sunnah* of the companions is today called into question. One cites in this regard the Koran which says: "Therefore take a lesson, o endowed with insight!" (101/59:2). Here, the Koran encourages to exert effort (*ijtihad*) and not to rely on imitation (*taqlid*). And yet, following the opinion of a companion would be imitating him by putting his opinion above reasoning by analogy (*qiyas*). They also cite the fact that the companions contradicted one another: if the opinion of one companion was binding, it was nec-

essary that the other companions conform to it. Yet, some opinions of the companions had been contradicted by the other companions and no one opposed them. Two cases are cited:

- The Caliph 'Ali (d. 661) disputed the ownership of a shield in possession of a Jew. The judge Shurayh (d. between 695 and 717) asked 'Ali to provide two witnesses to prove the ownership. He presented his *protégé* and his son. The judge accepted the testimony of the *protégé*, but he denied that of the son, in spite of the contrary opinion of 'Ali. The latter gave in.
- A man vowed to kill his own son. Ibn-'Abbas (d. v. 686), a companion, asked him then to sacrifice one hundred camels instead of his son. Another companion gave a contrary opinion by prescribing the sacrifice of one sheep, citing the sacrifice of Abraham who killed a billy goat instead of his son.

It is also reported that the Caliph Abu-Bakr (d. 634), when he expressed his personal opinion, used to say: "That is my opinion. If it is right, it comes from God. If it is wrong, it comes from me and I implore God's pardon." The secretary of the Caliph 'Umar (d. 644) is said to have written in a missive: "Such is the opinion of God and 'Umar." 'Umar disapproved and corrected him: "Such is the opinion of 'Umar. If it is right, it comes from God. If it is wrong it comes from me." It can be deduced that the companion is a *mujtahid* like any other, subject to error. That the companion is pious and knowledgeable does not mean for that matter that one should imitate him.

Al-Shawkani (d. 1834) goes even further. He says that the opinion of a companion is not a criteria because God sent to the Muslim community only Muhammad and the whole of the nation, including the companions, is obliged to follow the Koran and the *Sunnah* of Muhammad. To say the contrary is a serious matter and would transform the companion into a legislator like the Prophet. He challenges the authenticity of the hadith of Muhammad which says: "My companions are like the stars, if you follow one of them, you will find yourselves on the right path." And even if the narration was authentic, it should be interpreted as signifying that the companions were following the Koran and the *Sunnah* and, in this regard, they were worthy of imitation. They should therefore be followed only if what they say is based on these two sources.

Some authors see in the sanctification of the companions of Muhammad the reason for which several mythic or false hadiths attributed to Muhammad infiltrated collections of the hadiths.

Chapter IV.

The *Sunnah* of the people of the house of the Prophet

Shi'ites reject the *Sunnah* of the companions of the Prophet¹ and take into consideration only the *Sunnah* of the People of the House (*ahl al-bayt*) of Muhammad as source of law.

¹ Al-Hakim: *Al-usul*, p. 135-143.

I. Infallibility of the People of the Household of the Prophet

The obligation of following the *Sunnah* of the People of the House of the Prophet is based on the Koran:

God wants to remove the abomination from you, people of the house [of the Prophet], and to purify you fully (90/33:33).

O you who believed! Obey God, and obey the messenger and those charged with authority among you (92/4:59).

However, the Shi'ites say that God could not have prescribed obedience to those who oversee the commandments if they were exposed to error. They add that those in power should be singled out and well known. And these are, necessarily, the People of the House of the Prophet (*ahl al-bayt*).

Shi'ites also cite the following hadith of Muhammad:

I left among you what will stop you from going astray if you hold fast to them: the book of God, a rope stretching from heaven to the earth, and my descendants, People of my House; the two will never be separated until the basin will be poured over me. Take care then to establish the succession after me." According to other sources, Muhammad said: "I am on the point of being called back and I will accept. Here, I leave among you two weighty things: the book of God and my descendants the People of my House. The Merciful has informed me they will never be separated until they will pour over me the basin. Take care therefore to establish the succession after me.

The People of my House resemble the arch of Noah: he who boards it will be saved and the one who does not will perish.

Stars are a surety for the people in heaven and the People of my House are a surety for my nation." The narration is reported under the following form: "Stars are a surety for the People on earth against shipwreck and the People of my House are a surety for my nation against divergences. If an Arab tribe diverts from them, it goes astray and would become partisan of the devil.

Shi'ites deduce from these narrations the following elements:

- People of the House of Muhammad are infallible since they were associated with the Koran and because attaching oneself to them avoids going astray.
- The necessity to attach oneself to them: since the Koran and the People of the House of Muhammad, together, constitute one condition for avoiding going astray.
- People of the House of Muhammad and the Koran will remain united up to the day of the resurrection. This means that, in every epoch, there will always be one person of the House capable of fulfilling the mission.
- People of the House of Muhammad distinguish themselves through their knowledge of religious law and in everything else. Muhammad said: "Praise to God who imparted us with wisdom, the People of the House."

We note here that the Sunnites contest the hadith in question and say that Muhammad said "the Koran and my *Sunnah*" and not "the Koran and the People of the House," although some Sunnite sources quote the latter form.¹

As for the Shi'ites, they retort saying that one would not rely on the *Sunnah* of Muhammad, since it was not unified during the time of Muhammad and contains many contradictory hadiths. One cannot impose on a nation an undetermined and imprecise legislation without a person of reference; whence the importance of the lineage of the House of Muhammad to serve as the guardian of law.

Shi'ites say that the *imam* is the protector of the law, as was Muhammad. By this fact, it is necessary that he be infallible. Were he not, he would be exposed to error and, in that case, one would not be obliged to follow him, and he would become irrelevant.²

II. Determining members of the People of the House of Muhammad

Shi'ites understand the People of the House of the Prophet to include: Muhammad himself, his daughter Fatima, her husband 'Ali (d. 661) and their two sons, Al-Hasan (d. 669) and Al-Husayn (d. 680). Muhammad cloaked the four persons and said the following prayer: "These are the people of my house, cleanse them of any stain and purify them." In another hadith, he brought under his cloak the four persons while reciting the verse "God wants to remove the abomination from you, people of the house [of the Prophet], and to purify you fully" (90/33:33). In this manner, he nominated in a definitive manner the people who would enjoy infallibility.

According to the Shi'ites, there was no need for Muhammad to foresee all those who would come after him. It was enough to designate one person and that the person designates in his turn his successor. The question could not be left to the people because they would not be capable of comprehending it. According to one hadith, Muhammad stated that the lineage of 'Ali was to be of twelve emirs, all from the Quraysh tribe of Muhammad. According to another hadith, he added: "Power will remain with the Quraysh as long as there will be two persons [on earth]."

Chapter V. Laws revealed before Muhammad

Muslim authors consider the laws revealed before Muhammad (*shar' man qablina*: laws of our predecessors) as a source for Islamic law. The laws are taken into consideration only in the measure in which they are reported by the Koran or the *Sunnah* of Muhammad. It is therefore not a question of an independent source.

¹ Abu-Zahrah: *Al-imam al-Sadiq*, p. 195.

² For more information on the pros and cons of the concept of the infallibility of the Imam, see Al-Hakim: *Al-usul*, p. 147-189; Al-Subhani: *Mafahim*, vol. 4, p. 373-450; Al-Muntadhiri: *Dirasat*, vol. I, 380-389; Al-Salusi: *Aqidat al-imamah*; Al-Salusi: *Athar al-imamah*, p. 29-136; 'Abd-al-Nadhir: *Mas'alat al-imamah*, 415-479; Abu-Zahrah: *Al-imam Al-Sadiq*, p. 186-206.

I. Necessity of believing in all the prophets

1) God sends the prophets

Muslims believe that God sent to every nation a prophet to guide it on the right path, the last of them all being Muhammad. Punishment is linked to the violation of a well-known norm. No penalty without a law. And such a law can only come from God:

We raised in every nation a messenger: "Adore God and avoid the idols." God guided some of them, while misguidance has proved true against others (70/16:36).

And we were not to punish until we send a messenger (50/17:15).

We did not destroy any city unless it has had warners as a remembrance, and we were never oppressors (47/26:207-208).

Besides Muhammad, the Koran names 24 prophets that God sent to humanity. Seventeen appear in the Old Testament: Adam, Noah, Idris (Enoch?), Lot, Abraham, Isaac, Ishmael, Jacob, Joseph, Moses, Aaron, David, Salomon, Job, Jonas, Elijah, Elisha. Three appear in the New Testament: John the Baptist, Zachariah and Jesus. The four others belong to the oral tradition of the Arabs: Shu'ayb, Dhu Al-Kafl, Salih and Hud. The Koran does not consider the list as being exhaustive.

[...] and messengers whom we have narrated to you before, and messengers whom we have not narrated to you (92/4:164).

Muslim authors distinguish between prophet (*nabi*) and messenger (*rasul*). The messenger is one entrusted with a message addressed to a human group, which is not necessarily the case for the prophet. Among the messengers, Noah, Abraham, Moses and Jesus are qualified as endowed with resolution (*ulu al-'azm*); their imitation was recommended to Muhammad. The distinction comes from the verse:

Therefore endure, as endured the messengers endowed with resolution (66/46:35).

All the prophets come from God. The believer should not reject any of them:

Say: "We believed in God, in what was descended to us, in what was descended to Abraham, Ismael, Isaac, Jacob and the Tribes, in what was given to Moses and Jesus, and in what was given to the prophets, [coming] from their Lord. We do not distinguish between anyone of them. We are submitters to him" (87/2:136).

The messenger believed in what was descended to him from his Lord. And believers, everyone believed in God, his angels, his books and his messengers. We do not distinguish between anyone of his messengers. They said: "We heard and obeyed. [We ask] your forgiveness, our Lord. To you is the destination!" (87/2:285).

Those who disbelieve in God and his messengers, who want to distinguish between God and his messengers saying: "We believe in some and disbelieve in others," and who want to take a way between that, those are the true disbelievers! We prepared for the disbelievers a humiliating punishment. Those who be-

lied in God and his messengers and do not distinguish between any of them, he will give them their wage. God was forgiver, very-merciful (92/4:150-152).

On the penal level, a Muslim who denies the prophecy of one of the prophets named by the Koran becomes an apostate; he merits the death penalty. Thus, article 178 of the Egyptian project of penal law, prepared by a parliamentary commission in July 1982, says that an apostate is one who denies what common people know as being necessary in matters of religion. The memorandum accompanying the project specifies that the concept includes belief in sacred books as messages of God to his creatures, belief in all messengers of God mentioned in the Koran and belief in the content of the messages related to the day of resurrection and the day of judgment as well as in the basic norms of law and the institutions that God has approved of for the believers.¹

However, prophecy does not continue eternally. It stops with Muhammad:

Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets (90/33:40).

The Koran seems to draw the line for the religions that preceded it by asking their adepts to become Muslims:

Whoever seeks as religion other than the Islam, it will not be accepted from him, and he will be, in the last [life], of the losers (89/3:85).

The verse should be balanced by other verses which indicate that divergences among communities were willed by God:

Had God wished, he would have made you only one nation. But [he wants] to examine you in what he gave you. So race each other to the good. To God will be your return altogether and he will inform you about that wherein you were diverging (112/5:48; see also 52/11:118, 70/16:93 and 62/42:8).

2) Laws revealed before Muhammad have been falsified

While acknowledging the prophets who preceded Muhammad, the Koran accuses the Jews and the Nazarenes of having altered their own sacred books:

Covet you, then, that they would believe in you, although a group of them hear the words of God and displace them after having discerned them, while they knew? (87/2:75).

Woe to those who write the book with their hands, and then say: "It is from God" to exchange it with a small price! Woe to them for that their hands have written, and woe to them for what they earn! (87/2:79).

Those who conceal what God descended from the book and exchange it with a small price, they eat but fire into their bellies. God will not speak to them, on the day of resurrection, nor will he purify them. They will have a painful punishment (87/2:174).

Among them, there is a group that twist their tongues [while reading] the book so that you would think that it is from the book, whereas it is not from the book.

¹ *Iqtirah bi-mashru' qanun bi-isdar qanun al-'uqubat*, p. 179.

They say: "It is from God," whereas it is not from God. They say lies against God, whereas they know (89/3:78).

For they had broken their commitment, we cursed them and hardened their hearts. They displace the words from their places and forgot a part of what they were reminded of. You will not cease to learn of treason from them, but a few of them. Forgive them and absolve [them]. God loves the good doers. From those who said: "We are Nazarenes," we took their commitment. But they forgot a part of what they were reminded of. Therefore we have stirred up enmity and hatred among them until the day of resurrection. Then God will inform them of what they were doing. O people of the book! Our messenger came to you, making manifest to you much of what you were hiding from the book, and forgiving much! A light and a manifest book came to you from God (112/5:13-15).

Say: "Who descended the book which Moses came with it as light and guidance for the humans? You make it papers which you show, though you hide much (55/6:91).

Then those among them who oppressed substituted another word for the one that was said to them (7:162).

The alteration by the Jews and the Nazarenes of their own books had for consequence the association of other divinities to God:

The Jews said: "Ezra is son of God" and the Nazarenes said: "The Messiah is son of God." That is their saying from their mouths, imitating the saying of those who have disbelieved before. May God combat them! How then are they perverted? They took their doctors, their monks, and the Messiah son of Mary, as lords besides God, whereas they are commanded to adore only one God. There is no god but him! Be he exalted! [High be he] above what they associate! (113/9:30-31).

It had also for consequence voluntary obliteration of the name of Muhammad from their books, thus denying his mission:

Those to whom we gave the book recognize it as they recognize their sons. But a group of them conceal the truth, whereas they know! (87/2:146).

In spite of the last reproach, Muslims of all times have endeavoured to exploit the least clue in the sacred books of the Jews and the Nazarenes to prove that they had foreseen the coming of Muhammad. In so doing, they repeat in fact the manner of reasoning of the Christians who see in Jesus the accomplishment of the oracles of Jewish prophets, a presumption on which are based the New Testament and the writings of the Church Fathers. Hence, for example, the Gospel of St Matthew (1:18) in narrating the miraculous conception of Jesus through the Holy Spirit, associating it to the passage of Isaiah: "Therefore the Lord himself will give you a sign. Look, the young woman is with child and shall bear a son, and shall name him Immanuel" (Is. 7:14). Muslims see in the words of Jesus before his ascension into heaven – "And see, I am sending upon you what my Father promised; so stay

here in the city until you have been clothed with power from on high" (Lk 24:49) – an announcement of the coming of Muhammad.

Contemporary Muslim authors consider the Gospel of Barnabas as being the only authentic Gospel because it mentions the name of Muhammad. The text, written probably by a Spanish Jew of the Middle-Ages, a convert to Christianity and, thereafter, to Islam, is often cited by Muslims with polemical objectives. Some Muslim authors base themselves on it to affirm the obligatory character of male circumcision.¹

II. Status of the laws revealed before Muhammad

1) Preservation of the laws of religious communities

Even if the sacred books of the Jews and the Nazarenes are considered to have been falsified, the Koran asks the two communities to conform themselves to their own books. When consulted by the Jews to be the arbiter, Muhammad would inquire about the content of their Bible and would apply to them its norms, even when the community had decided otherwise, as demonstrated by the episode of the two adulterers. It is the system of the personality of the law that has left, even today, traces in Arab countries in matters of personal status, of which we spoke above.²

2) Muslims and laws revealed before Muhammad

Starting with the presumption that Jewish and Christian sacred books have been falsified, Muslims do not consider themselves bound by the norms dictated by these books. They adhere to their own non-falsified sacred book and to their own prophet who is infallible. The Koran demands of Muhammad to apply to his communities what was revealed to him:

We descended to you the book with the truth, confirming what is before it of the book and predominant on it. Therefore judge between them by what God descended and do not follow their desires, far from the truth that came to you. To each of you we made legislation and conduct (112/5:48).

This community had to distance itself from other communities on the level of legislation, and Muhammad forbade it to consult the sacred books of others. It is reported in this regard that one day 'Umar (d. 644), the future second Caliph, was reading a Jewish text. Muhammad was vexed and said to those present: "O people! I received the totality of the scriptures and their seals. They were summarized for me and I delivered them to you in their pure form. Do not let yourselves be misled and do not let those who mislead you manipulate you." He then ordered that the text be erased one letter after the other. In another similar episode concerning Muslims, Muhammad said: "The height of the error of a nation is to abandon what their prophet brought them to look for what another prophet says." In a third episode, Hafsa was reading a Jewish text containing the history of Joseph. Muhammad was vexed and said: "By he who holds my soul in his hands, if Joseph came to you in

¹ See Aldeeb Abu-Sahlieh: *Circumcision*, p. 160-162. For a French translation of this gospel, see the bibliography under: *Évangile de Barnabé*.

² See Part I, chapter III.

person while I am your prophet and you follow him by abandoning me, you will go astray. I am your fate among the prophets and you are my fate among the peoples." In a fourth episode, some companions of the Prophet passed in front of some Jews who were reading the Torah. They showed them reverence. The Prophet reproached them and recited them the verse: "Is it not sufficient for them that we descended to you the book, being recited to them? In that is a mercy and a remembrance for a people who believe" (85/29:51).

When President Sadat proposed in 1977 to establish common school books for religion and social ethics, the Cairo periodical *Al-I'tisam* reminded him that Muslims cannot refer to the sacred scriptures of the Jews and the Christians. It cited the above-mentioned episodes.¹ This is the reason why state school books in Arab and Muslim countries do not contain passages of the Old or the New Testament. It is to be highlighted too that contemporary biographies of the prophets written by Muslim authors are based on information transmitted by the Koran and the *Sunnah*, and never on the sacred books of the Jews and the Christians. In the book fairs that have taken place in some Arab countries such as Saudi Arabia, Yemen, the United Arab Emirates or Kuwait, visitors do not find these books and their bookshops do not sell them.

3) Laws revealed before Muhammad mentioned in the Koran and the *Sunnah*

In spite of the negative attitude of the Muslims with regard to the sacred books of other communities, the Koran and the *Sunnah* abound in references, narrations and passages taken sometimes literally from the Old Testament and apocryphal versions of the Gospel. Some of the passages have a normative character. Cited by the Koran, the passages cannot be considered by the Muslims as being falsified. Thus, Muslim jurists ask themselves whether these normative passages are binding for the Muslims as well. They distinguish between three categories of norms:

A) Norms whose application is limited to their addressees

Some norms indicate that their application is destined to a particular group or that Muslims are exempt. This is the case of the norm that forbids Jews from consuming certain types of food:

Say: "In what was revealed to me, I do not find forbidden, on an eater that he eats, except carrion, flowing blood, pig's meat - for it is an abomination - or what is sacrificed, by perversity, to other than God." But whoever is forced, and is not rebel nor transgressor [...]. Your Lord is forgiver, very-merciful. We forbade the Jews all animals with claws. Of oxen and sheep we forbade them their fat, except what is in their backs or entrails, or what is mixed with the bone. Thus have we repaid them for their abuse. We are truthful (55/6:145-146).

The first verse concerns Muslims. As for the second, it is limited to the Jews. A case can be cited of a hadith of Muhammad which says: "The booties, forbidden to anybody before me, have been authorized for me." According to the hadith, it was forbidden for other nations to get the booties, only to be allowed to Muhammad.

¹ *Al-I'tisam*, March 1977, p. 8-12. For more information on this question, see Aldeeb Abu-Sahlieh: *L'enseignement*, p. 26-27.

B) Norms whose application is extended to the Muslims

Some norms indicate explicitly that they are applicable to the Muslims. Hence, the Koran prescribed fasting for the Muslims following the example of what was prescribed to those who preceded them:

O you who believed! It is prescribed for you fasting as it was prescribed for those before you. Maybe you fear [God]! For numbered days (87/2:183-184).

The same goes for sacrifice. Muhammad says: "Accomplish sacrifice, for it is a norm of your father Abraham."

C) Norms whose addressees are not precised

Some norms are prescribed for particular groups, but it is not mentioned whether they are also applicable to the Muslims. It is on this last category of norms that jurists diverge. The majority says that these norms are binding for Muslims by default of explicit indication concerning their abrogation. If God mentions an anterior law he implicitly approves it, even if he does not explicitly enjoin the Muslims to follow it. The following verses can be cited to this effect:

We descended the Torah wherein is guidance and light. By it, the prophets who submitted, as well as the rabbis and the doctors judge the Jews (112/5:44).

These are they whom God guided. So follow their guidance (55/6:90).

He has legislated for you as the religion what he enjoined on Noah and that which we have revealed to you, and what we have enjoined on Abraham, Moses and Jesus: "Establish the religion, and be not divided therein" (62/42:13).

The opponents say that norms revealed to previous people have been abrogated except in case of contrary indication in the Koran or the *Sunnah*. Muhammad, they say, had asked Mu'adh Ibn-Jabal (d. 639) what he would do if he did not find norms to rule by in the Koran and the *Sunnah*, he responded that he would have recourse to *ijtihad*. Muhammad assented. Yet, were the norms of the preceding people a source, they would have been indicated to him. They also cite a word of Muhammad which says: "Other prophets were sent to specific people and me I was sent to the entire humanity." One should therefore not obey specific laws.

Madkur, a contemporary author, leans towards the majority opinion as long as norms of other people do not enter into conflict with the good of the people (*salah al-nas*). These laws are revealed, on condition that they be cited in the Koran or in *Sunnah* and that no other source of Muslim norm contradicts them. The value of this source is considered at least to be equal to the value of the "sayings of the companions" which some consider to be a source for law.¹

4) Practical implications of the laws revealed before Islam

There are several practical implications of the laws revealed before Muhammad.

A) Retaliation law

The following Koranic passage speaks of the retaliation law mentioned in the Bible (Lv 24:19-20; Ex 21:23-24):

¹ Madkur: *Usul*, p. 123. For more information on the question, see Hasab-Allah, p. 73-75.

We descended the Torah wherein is guidance and light. By it, the prophets who submitted, as well as the rabbis and the doctors judge the Jews. For to them was entrusted the protection of God's book, and they were witnesses thereto. Therefore do not dread the humans, but dread me. Do not exchange my signs with a small price. Those who do not judge by that which God descended, they are the disbelievers. We prescribed for them therein: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and for wounds retaliation. But whoever forgoes it, this shall be for him an expiation. Those who do not judge by that which God descended, they are the oppressors (112/5:44-46).

Should the retaliation law mentioned here be considered as being destined for the Jews as well as for the Muslims? If we respond affirmatively, that would signify that men and women, Muslims and non-Muslims are equal before the retaliation law, a view which does not please the opponents who consider that the passage is addressed only to the Jews, whereas Muslims must obey another passage related to the retaliation which says:

O you who believed! It is prescribed for you retaliation in the killed: free man for free man, slave for slave, female for female. And for him who is forgiven anything by his brother, prosecution according to usage and payment unto him in goodness. That is a lightening from your Lord and a mercy. Whoever aggresses thereafter, he will have a painful punishment (87/2:178).

As can be noted, this passage, contrary to the preceding one, does not foresee the principle of equality.

B) Dowry

Islamic law prescribes for man the payment of a dowry to the woman he wants to marry; it comprises usually a sum of money. Can he offer her a service, sew a gown, build her a house? Those who admit the extension of the laws revealed before Muhammad to Muslims evoke the Koranic verse related to the marriage of Moses:

[The father] said: "I want to marry you to one of these two daughters of mine, provided that you hire yourself to me for eight years. If you complete ten, so it is from you. I do not want to make it hard for thee. If God wishes, you will find me of the righteous" (49/28:27).

C) Brokerage contract

The Koran narrates, with some variations, the story of Joseph and his brothers which is in the Bible (Gn. 44). Wanting to keep with him his brother Benjamin, Joseph supplied provisions to his brothers and hid the cup of the king in the sack of Benjamin; and then he accused his brothers of stealing. He mandated his servants to search for the cup promising the one who would bring it back a camel's load (53/12:70-72). Jurists have deduced from the passage that brokerage (*ja'alah*) on condition of result is permitted by the Koran.

D) Guarantee

Still in the story of Joseph, the latter asked his brothers to bring back with them their youngest brother if they were to have other provisions in the future. Preoccupied, Jacob says to his sons:

I will not send him with you until you give me a commitment by God that you will bring him back to me, unless you are surrounded." And when they gave him their commitment, he said: "God is guardian of what we say (53/12:66).

This verse means for the Muslim jurists that the contract of guarantee is licit.

E) Usufruct of the totality of goods held in common

The Koran says in Abraham's story with his nephew Lot:

Inform them that water is allotted among them, every drinking being [taken] in presence [of each other] (37/54:28).

The verse signifies that a co-owner can benefit from the totality of goods held in common for a certain period of time.

F) Indemnity to be paid by the owner of the animals

The Koran says in the story of David and his son Solomon:

In that time, David and Salomon had to judge about a tilt into which the people's sheep had strayed. We were witness to their judgment (73/21:78).

Commentators of this laconic verse explain that David had decreed that the flock would become the property of the one whose field had been ravaged; but Solomon advised that the flock be entrusted to him temporarily, as usufruct, and that the guilty waters his field, until it becomes as before, in order to take back his flock again.

Chapter VI. Custom

I. Definition of custom

Custom ('urf) is defined as follows: "That which is enrooted in the souls and which people of good conduct in a particular Islamic region have come to accept, on condition that it does not contradict a text of the *Shari'ah*."¹

Muslim authors have established a distinction between a customary rule and a rule acquired through the consensus (*ijma'*) of the doctors of law:

- A norm based on the consensus is a product of the opinion of specialists; the norm based on custom is one that is accepted by the public in general.
- Consensus requires unanimity of the *mujtahids* of the time when the norm was established; for the custom it is sufficient to have the approval of the majority of the community.

¹ Besides the primary sources cited in the bibliography, see Al-Khayyat: *Nadhariyyat al-'urf*; 'Alyah: *Al-qada' wal-'urf*, p. 142-178.

- Consensus binds the community in place and time; custom is changeable.

An example of custom: the fisher of pearls who would claim before the judge having sold to a merchant ten keils (a measure containing 20 to 30 kilos, depending on the country) of pearls, would have his submission dismissed, if the defendant counter-opposed that the word keil was pronounced at the time of the sale by mistake, but that he in fact bought only ten misqals (a measure equivalent to a gram) of pearls. In this case the judge would base his decision on the proof of usage, the invariable being the sale of pearls per misqal and never per keil.

II. Legitimation of the recourse to custom

Classic Muslim jurists consider custom to be valid as a source of norms enforceable in case of the absence of the text of the Koran or the *Sunnah*. They legitimize the recourse to custom through the Koran, the *Sunnah* and reasoning.

The term '*urf*' is found once only in the Koran, in verse 39/7:199:

Take the excess, command the appropriate [*'urf*] and disregard the ignorant.

It is also possible to translate the first part of this verse as follows: "Keep to forgiveness" (Pickthall); "Take what is given freely" (Sahih International); or "Take the abundance" (Arberry).

The Koran uses several times the term *ma'ruf* which can be translated in some verses by custom. We cite three verses:

Repudiated women shall wait for three menstruations. It is not permitted to them to conceal what God created in their wombs, if they believe in God and the last day. Their husbands have more right to bring them back during [this period], if they want the reconciliation. And the [women] have rights similar to those [of men] over them according to usage, but men have a degree above them. God is mighty, wise! (87/2:228).

From among you there should be a nation calling for the good, commanding the appropriate, and forbidding the detestable. Those are the successful (89/3:104).

O you who believed! It is not permitted to you to inherit the women unwillingly. nor to hinder them [from marrying], in order to take from them part of what you had given them, unless they commit manifest depravity. Consort with them according to usage. If you dislike them, then perhaps you may dislike something and God makes in it much good (92/4:19).

The verse 92/4:115 would indirectly imply respect for custom:

Whoever is in dissension with the messenger after the guidance became manifest to him, and follows a way other than that of the believers, we will turn the back on him as he turned the back, and will roast him in gehenna. How evil is the destination!

It is believed that the term "way" signifies custom. One can also cite a narration of Muhammad which says: "What the believers consider to be good is equally good for God." Muhammad told a woman to take goods from her husband that would be sufficient for her and her son according to the custom (*bil-ma'ruf*).

They also evoke a rational argument. Custom assures the good of the community and puts an end to its embarrassment. Yet, this is a principle acknowledged by the Koran:

Whoever is sick or on a journey, a number of other days. God wants ease for you, he does not want hardship for you (87/2:185).

God does not want to lay upon you any hardship (112/5:6).

One cannot therefore stop people from having recourse to custom. The Koran itself acknowledged certain customs which were accepted among the Arabs. As such, it admitted the payment of blood price by the one responsible for an offence. Similarly, it took up again a major part of the forms of commercial contracts of its time. Caliphs after Muhammad sanctioned some customs of conquered countries, such as registers of the army and of tax and coined money. Jurists have put as a condition for becoming a *mujtahid* knowledge of customs. They note in this regard that Al-Shafi'i (d. 820) modified some of the opinions he proclaimed in Baghdad, because Egyptian customs were different from those of Iraq. That is why they distinguish in him two doctrines, one Iraqi the other Egyptian.

Custom saw its consecration in the articles 13 and 36-45 of the *Majallah*.¹ Some contemporary authors refuse to see in it an independent source. They attach it to other sources such as implicit consensus (*ijma'*), unregulated interests (*masalih mursalah*) or pretexts (*dhara'i'*) which we shall deal with below. Al-Hakim, a Shi'ite, has adopted an even more radical vision with regard to custom and does not see in it any foundation in the Koran or in the *Sunnah* to consider custom as a source of *Shari'ah*.²

III. Conditions for the recourse to custom

Custom has to fulfil four conditions in order to be evoked.

1) Non-violation of the text of the Koran or the *Sunnah*

Hence, customs existing during the time of the revelation which the Koran expressly condemned should not be taken into consideration. Such custom clashes directly with the will of the Legislator (God). That is the case with reciprocal marriage through consent without dowry (*zawaj al-shighar*): "I marry you my daughter without dowry if you marry me your daughter without dowry." Even when such a marriage becomes custom it will not be considered licit. It is possible, however, that a custom establishes a special norm. This is how Islamic law forbids the sale of a non-existing object. Custom, however, admits craftsmanship (*istisna'*), even when it is a question of a contract concerning something that does not exist at the time of the contract. The general prohibition is therefore maintained although the specific contract established by custom is permitted.

There are cases where the custom is the basis of a text of *Shari'ah*. In that case, the change which intervened in the custom does not contravene the *Shari'ah* and it must be taken into account. Hence, Muhammad says that the silence of a virgin daughter is equivalent to consent. This manner of doing comes from the fact that

¹ See his articles in Part II, chapter IX.II.

² Al-Hakim: *Al-usul*, p. 417-426.

daughters were too reserved during the time of Muhammad, which is not the case today in a good number of countries. One cannot therefore apply the words of Muhammad; the daughter must give her verbal consent to marriage. The change of the situation in this case renders necessary the change of the norm. Similarly, the presence of young women in the mosques during community prayer was forbidden in spite of the fact that it was allowed during the time of Muhammad. The change is due to the current degradation of morals.

Custom can be general and the text can be specific. In that case, only the part of the custom which contravenes the texts is invalid. Thus, Muhammad prescribed the payment of legal tax for camels fed through the manger. The custom that exempts camels from tax is not applicable to the camels specified in this narration.

Custom can be specific too and the text general. In this case, according to some, custom is considered a special rule with regard to the general text. Thus, the Koran says: "Mothers may suckle their children for two whole years" (87/2:233). And yet, a custom has it that noble women use services of a nursemaid to breast-feed their children. Custom exempts a woman from breast-feeding if her children accept feeding from other breasts.

2) Being general (*muttaridah*)

There is no need for custom to be unanimous; but it is sufficient that it be accepted by the majority. Due to the changeable character of custom, to prove its generality, it is necessary to refer to the people concerned by the custom, and not to the works of the jurists.

3) Existing at the time of the juridical rapport

Custom cannot have a retroactive effect. Al-Khayyat gives a modern application of this law through the question of the depreciation of money. If one lends dollars which were costing so much of the national currency, and then, afterwards, the dollar depreciates, one has to pay back the sum on the basis of the old exchange rate.¹

4) Not being contrary to the accord of the parties

Article 13 of the *Majallah* says: "No attention shall be paid to inferences (implication) in the face of an explicit statement." Thus, if the custom consists in paying the price by down payment, the parties can foresee that the payment will be by cash, their accord prevails over the custom.

IV. Classification of customs

1) Verbal and factual custom

One can distinguish between verbal (*'urf qawli*) and factual custom (*'urf 'amali*).

The verbal custom is the one which attributes to terms a particular meaning. Thus, the term *walad* signifies a male child even if in language and for the Koran (92/4:11) it includes boys as well as girls. The term *dabbah* signifies animal with four legs even if in language it signifies anything that moves on earth. The term *lahm* signifies animal meat with the exception of chicken, birds and fish, even if in

¹ Al-Khayyat: *Nadhariyyat al-urf*, p. 56.

the Koran (70/16:14) the term is also used to designate flesh of fish. For this reason, according to Ibn-'Abidin (d. 1836), the words of the author of legacy or of a *waqf* and the one who makes the vow, swears an oath or concludes a contract are interpreted according to one's language and one's custom and not according to the language of the Koran.

The factual custom is one to which people have been used to in their life and in their rapports. Among such customs are cited dowry paid by the husband in two instalments, one paid in advance and the other paid in case of repudiation, the refusal to take the woman to the husband before paying the first instalment of the dowry, entering the bath against paying a certain amount of money without the signing of the contract and without a preliminary agreement on the duration and the quantity of the water to be used, the payment of rent before using the rented apartment, the meal of a private worker as being part of his salary, etc.

2) Special and general custom

The actual customs cited above are considered general; they are known by everybody. We can also cite among the general customs that the ignorant must turn to the knowledgeable to learn from him what he ignores.

Special customs are particular to a given region or a given category of professions. Thus, in Iraq, the word *dabbah* mentioned above is limited to the horse. Similarly, the registration of debts by merchants in the registers can serve as proof even if there is no witness. In certain regions, the husband must offer determined gifts to certain members of the spouse's family.

3) Licit, illicit and necessary custom

A licit custom is one which does not allow what is forbidden by Islamic law and does not forbid what is allowed by Islamic law.

An illicit or invalid (*fasid*) custom is one that is accepted by the public but forbids what is allowed or allows what is forbidden by Islamic law. Such is the case for the dealings of banks concerning interest, mixed meetings of men and women in clubs and during feasts, the use of alcohol and dances during festivities, the abandoning of prayer during public feasts, the wearing of golden rings and silky clothes, playing the lottery, horse race betting, low-necked clothes, female escort of the funerals, candles on the tombs, etc. All these customs are contrary to the *Shari'ah* since there is a clear text that forbids them.

It is possible, however, that a customary norm contrary to a principle of Islamic law is imposed out of necessity. It can be accepted in that case as an exception. If, by contrast, the custom is not dictated by necessity, but simply by negative inclinations, it must be denounced.

Chapter VII. Rational effort (*ijtihad*)

I. Definition

Besides the above-mentioned sources which are known as transmitted sources (*masadir naqliyyah*), classic and contemporary Muslim jurists attach great importance to *ijtihad*.

Etymologically, *ijtihad* signifies exerting of effort. On the juridical level, it is defined as: "The action of straining the forces of one's spirit to their extreme limits to penetrate the intimate meaning of the *Shari'ah* (Koran and *Sunnah*) in order to deduce a speculative rule (*qa'idah dhanniyyah*) applicable to concrete cases to be resolved."

One has to keep in mind that Islamic law denies man the right to legislate. By consequence, the role of human reasoning which underlies *ijtihad* is not to create norms, but to deduce from the Koran and the *Sunnah* new norms respectful of the two sources. It is a question of the jurist proceeding by analogy, examining the reason behind the religious law, showing preference of one norm over the other, filling in the gap by taking into account the general interest, etc.

The negation of legislative power of man goes as far as asking oneself whether one has the right to have recourse to rational effort as a method of deduction of norms. Also, the first question asked is the one of legitimation of the recourse to rational effort.

II. Legitimization of the recourse to *ijtihad*

1) Arguments of the adversaries

Those who criticize the recourse to *ijtihad* base themselves on the premise that the texts of the Koran and of the *Sunnah* offer to man all he needs in terms of norms. They support their arguments by the following verses:

Today, I perfected for you your religion, and fulfilled my favour upon you (112/5:3).

We did not neglect anything in the book (55/6:38).

[...] the day we raise up a witness from every nation among themselves against them, and we bring you as witness against these. We descended on you the book, as manifest [explanation] of everything, a way, a mercy and an announcement to the submitters (70/16:89).

They add that all that has not been regulated by the Koran and the *Sunnah* is left to the liberty of the believers in accordance with the initial permission (*'ibahah asliyyah*) expressed in the following verses:

It is he who created for you what is on the earth (87/2:29).

O you who believed! Do not ask about things that if they are shown to you would harm you. If you ask about them, when the Koran is descended, they will be shown to you. God pardoned [you] for them. God is forgiver, magnanimous.

A people before you asked about them, and then disbelieved therein. (112/5:101-102).

The principle of the initial permission signifies that anything that is not specifically forbidden remains permitted. They also evoke the forbidding of relying on opinion (*ra'y*). The Koran says: "If you dispute about a thing, so return it to God and the messenger" (92/4:59). Here the Koran does not call for submission to rational effort, but to God and to the Prophet. Elsewhere, the Koran says:

It is we who descended to you the book with the truth, so that you judge between the humans with what God showed you. Do not be a pleader in favour of the betrayers (92/4:105).

The Koran does not say "with what you think," but "with what God showed you."

They also cite the hadith of Muhammad where he says:

My nation will be divided into seventy plus groups, the most guilty among them is the one who weighs up religion by his opinion, forbidding what God has permitted and permitting what God has forbidden.

The Koran says in this regard:

If the truth had followed their desires, the heavens, the earth and whosoever is therein had been corrupted. Rather we gave them their remembrance, but they are disregarding of their remembrance (74/23:71).

The companions of Muhammad condemned recourse to rational effort. For instance, the Caliph 'Umar (d. 644) said:

The adepts of opinion are enemies of the tradition. They are incapable of learning the hadiths of Muhammad or understanding them and by consequence they are ashamed to say "we do not know" to those who ask them the question. They have therefore gone against the traditions of Muhammad through their opinion. Take warning.

It is reported of Ibn-Mas'ud (d. 652).

Your jurists will disappear and the people will learn from the ignorant, as leaders, regulating things according to their opinion, and hence Islam will be destroyed and rendered dull.

'Abd-Allah Ibn-'Umar said:

Science is limited to three things: the Book of God, the *Sunnah* and "I do not know."

2) Arguments of the partisans

The partisans of the recourse to *ijtihad* evoke also the Koran and the hadiths of Muhammad to support their position, to which they add the rational argument.

They cite the same verse as their adversaries in its totality:

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

They say that this verse invites having recourse to the Koran and to the *Sunnah* and to scrutinize their profound sound in order to deduce juridical norms, but without one's proper desires.

For them, the verses indicating that the Koran contains all that one needs to signify that the Koran contains general principles (*usul 'ammah*). If *ijtihad* was not allowed, it would not be possible to explain the *ijtihad* of Muhammad and his companions. This is how were decided the nomination of the Caliph Abu-Bakr (d. 634), the putting into writing of the Koran, the punishment of the consumer of alcohol, etc.

As for the warning against asking questions (112/5:101-102), it concerns those which should not be asked. Verse 92/4:105 which demands referring to "what God showed" Muhammad signifies "what God taught him," and that could include the rational effort.

The partisans also evoke the following verse:

In that time, David and Salomon had to judge about a tilt into which the people's sheep had strayed. We were witness to their judgment (73/21:78-79)

The verse indicates that the judgment of Solomon was preferred to the one of David. In spite of that, God accords to both of them the faculty of judgment and knowledge. Hasan Al-Basri (d. 728) commented on the verse as follows: "Were it not for the hadith concerning the two men, the judges would have been condemned. God in fact gave praise to Solomon, but he excused David for his effort." One can therefore be mistaken, but the effort is in itself commendable.

B) Arguments drawn from the Sunnah of Muhammad and his companions

The partisans evoke also the *Sunnah* of Muhammad and of his companions. Hence, when Muhammad sent Mu'adh Ibn-Jabal (d. 639) to Yemen, he asked him how he foresaw governing. He answered that he was going to have recourse to the Koran, the *Sunnah* and, by default, he would make an effort to reach an opinion (*ajtahid ra'yi*). Stroking the chest of Mu'adh Ibn-Jabal, Muhammad said: "Praise to God who has allowed his Messenger to find what pleases God and his Messenger."

Elsewhere Muhammad said: "If a governor makes the effort of reasoning and attains a true opinion, he has two merits; but if he gets mistaken, he has one merit." He also said: "Fear intuition (*farasah*) of the believers, it is certain that they see by the light of God."

They also report from the first Caliph Abu-Bakr (d. 634) that he used to search the Koran for a solution to the dispute that was brought before him. If he found nothing, he would try to apply a precedent of Muhammad. If he found nothing, he would assemble the senior officials and the best among the people to consult them and abide by their consensus.

When 'Umar (d. 644) appointed Sharih as judge of Kufa he told him: "See what seems clear to you from the Book of God (Koran) and ask nobody in its regard. If you find nothing clear in it, follow the *Sunnah* of the messenger of God. If you find nothing there too, endeavour to reason and ask for advice from people who are knowledgeable and good."

'Ali (d. 661) said to Muhammad: "Messenger of God, what shall we do if we come across a case whose solution is not foreseen in the Koran a year after your demise?" Muhammad answered: "Unite the people and subject the case to consultation (*ij'alah shura*), but do not follow one single opinion."

The practice of Muhammad and his companions contradicts the hadiths which condemn the recourse to reasoning. By consequence, the hadiths must be interpreted as signifying that it is forbidden to reason in the domain of religion where it is not allowed to do so.

C) Rational arguments

The partisans of the recourse to *ijtihad* say that Islam is the last religion and that it is good for every era and place. Whereas the texts of the Koran and the *Sunnah* are limited, problems are continually evolving. Therefore, to make up for the insufficiency of the two principle sources, it is necessary to have recourse to *ijtihad*. Without this, Islamic law would lose its flexibility and its capacity to adapt to every era and place.

3) *Ijtihad* of Muhammad

A problem raised by the Ash'arites and the Mu'tazilites with regard to *ijtihad* illustrates the manner of reasoning of Muslim thinkers. The two philosophical trends asked themselves whether Muhammad could have recourse to *ijtihad* in order to establish a juridical norm governing the questions he faced. They responded negatively. They cited the Koran:

Your companion is not misguided, nor was he misled. He does not speak out of desire. It is but a revelation that is revealed! (23/53:2-4).

Here the Koran considers the words of Muhammad as being part of the revelation. Yet, were he to exert rational effort such considerations would not have been concerned with revelation.

They add that were Muhammad to make an effort, he would not have had to wait for revelation to answer to the questions which were addressed to him, as was the case in many situations.

Finally, they say that revelation is more important than *ijtihad*, because error is excluded from the first source. If one can have access to the best, it is not allowed to have recourse to what is less so.

Specialists of the principles of law (*usul al-fiqh*) are of a contrary opinion. They cite the Koran in support of their affirmation:

It is we who descended to you the book with the truth, so that you judge between the humans with what God showed you. (92/4:105).

The verse signifies that Muhammad could have recourse to opinion (*ra'y*, derived from the verb *ara*), the gift of God to Muhammad. Elsewhere, the Koran says: "Therefore take a lesson, o endowed with insight!" (101/59:2). The call to reflect is also found in other verses and it is addressed to all, including Muhammad. He has even more right to reflect than others, since he knows the objectives of the legislation. To deprive the Prophet of reflection and rational effort would be to deprive

him of a capacity that would reduce his human knowledge; it would be to eliminate human reason. They add that if it is allowed to have recourse to *ijtihad* for one who can be mistaken, all the more so must *ijtihad* be allowed for one who rarely errs and for whom revelation intervenes to correct his mistakes.

Specialists of the principles of law also evoke the fact that Muhammad used to exercise *ijtihad* and to call upon his companions to do the same. He said to that effect: "I judge according to my opinion in the domain that was not the object of the revelation." In another hadith he invited 'Amr Ibn-al-'As to deliver justice in a case. The latter protested: "Should I judge while you are present?" Muhammad responded: "Yes. If you make the effort of reasoning and you attain a true opinion, you obtain two merits; but if you err, you obtain one merit."

Responding to the argument of the waiting of revelation advanced by the opponents, specialists of the principles of law say that Muhammad was waiting for revelation over questions which presented some difficulties or which would be resolved only by revelation. They also consider that revelation was independent of the will of Muhammad. By consequence, he could not make it descend at all times, but when he was mistaken in giving his own opinion, revelation took care of correcting him.

III. Conditions for *ijtihad*

1) Conditions related to the *mujtahid*

Classic and contemporary authors have established a catalogue, more or less long, of some of the requirements to be fulfilled by a *mujtahid*:

- To be of age and in possession of his mental capacity.
- Being equitable (*'adl*), that is of irreproachable religion and character, having committed no deadly sins and not insistent on minor sins, not fearing in truth neither reproaches nor the power of the authorities, searching only for the realization of public interest.
- Knowing perfectly everything related to normative Koranic verses: the reasons of their revelation, their sense and their field of application. Al-Shafi'i (d. 820) also demanded the knowledge of the Koran by heart.
- Knowledge of the hadiths of Muhammad, especially those that have a normative character.
- Knowing the discipline of abrogation, in order to be able to distinguish between abrogated verses and hadiths and those that abrogate the others.
- Knowing the opinions of preceding scholars and knowing how to distinguish between what had been the object of unanimous decision and what had caused divergence among them.
- Knowing the science of principles of law and knowing how to handle rules of reasoning by analogy.
- Knowing how to distinguish interests which Islamic law intends to safeguard in order to establish norms, in case of the absence of the text.

- Mastering Arabic and the rules of its expression for a better understanding of the meaning of the texts of Islamic law. Some go as far as classifying the scholars of *Shari'ah* according to the degree of their knowledge of Arabic: a beginner in Arabic language is a beginner in Islamic law, etc.

From these conditions, it can be noted that it is not necessary that a *mujtahid* be male or free. A woman and a slave can therefore be *mujtahid*.

These conditions are required in Islamic law for various functions where the person must have recourse to reasoning in conformity with a religious law: the *imam* or the one who exercises the supreme political authority, the executive minister (*wazarat al-tafwid*), the judge, the deputy judge, the agent of public morals in the market (*muhtasib*). But the function which has the most impact today is the one of the *mufti*, of which we shall speak later on.

Muslim jurists ask themselves to know whether the *mujtahid* must be competent in all the fields; or whether, on the contrary, it is enough for him to be competent in the matter presented to him. The question is legitimate due to the link between the different parties of Islamic law. It is admitted that the *mujtahid* may not cover everything, but he must at least be knowledgeable in the science of the principles of Islamic law. For this reason Muslim jurists classify *mujtahids* into different categories:

- *Mujtahid mutlaq* (absolute) or *mustaqil* (independent): these jurists establish norms related to the principles (*usul*) and to the different branches (*furu'*) of law. The category is reserved to the great *imams* of the 1st century of the formation of Islamic law, among whom the four leaders of the Sunnite schools of jurisdiction.
- *Mujtahid muntasib* (affiliated): a jurist who follows an *imam* in what concerns the principles of Islamic law, but diverts from him in what concerns the branches of law. That is the case for Abu-Yusuf (d. 798) and Al-Shaybani (d. 805).
- *Mujtahid fil-madhdhab* (according to a school): a jurist who follows his *imam* as much in the principles as in the branches of Islamic law but arrives at personal solutions for questions not tackled by the *imam*.
- *Muhafidh murajjih* (preponderant): the jurist who chooses a solution among many diverting solutions of the jurists who preceded him.
- *Muhafidh* (conservative): the jurist who knows what had been done before him and takes position in conformity with it, preferring one opinion over another.
- *Muqallid* (imitator): the jurist who understands precedent works, without knowing how to distinguish between what is good and less so.

2) Conditions related to the content of *ijtihad*

The required conditions for the *mujtahids* and their classification into different categories demonstrate that the one who is in charge of determining the norm to be applied does not dispose of the total freedom of decision. Different situations are distinguished in this regard:

- The question at hand has been resolved by a clear text: In that case, the *mujtahid* cannot have recourse to *ijtihad*. Thus, no one has the right to doubt the necessity of performing prayer (*salat*), the share of the heirs (*irth*), the pilgrimage (*hajj*), penalties related to robbery (*al-sarq*), the prohibition of alcohol (*shurb al-khamr*), alms-giving (*zakat*), as these domains are regulated by the Koran and the *Sunnah* through clear texts; hence the Muslim juridical rule: "Where there is a text there is no room for interpretation" (article 14 of the *Majallah*).
- The question at hand has been resolved by a text which gives rise to different meanings: If the *mujtahids* of a given period reach a unanimous decision concerning the text, it is not possible any more to make it say something else later.
- The question at hand has been resolved by a text which gives rise to different meanings and did not provoke a unanimous decision. In that case, the *mujtahid* can and must, through linguistic and legislative principles, try to render the meaning more probable than the other and act according to the results at which he arrives. Nothing stops one from trying to interpret a text even if the *mujtahids* of the previous period reached a divergent result.
- Finally, the question at hand was never resolved by any text, whether clear or not: In that case, the *mujtahids* of every period have a greater freedom to find norms by having recourse to the instruments of *ijtihad* (analogy, juridical preference, unregulated interests, custom, etc.). We shall come back to these concepts later.

In fact, these limitations "close the door of *ijtihad*," a closure that may have taken place during the 11th century. In his book published in French at the end of the 19th century, Savvas Pacha contested such a closure, but he acknowledged that Muslims admit *ijtihad* only within certain limits:

The legislative effort never ceased and will never cease to be exercised in [Islam]. There is no reason as to why its progressive and beneficial action ends. All the new events, all the new questions faced by the Muslim praetor, certainly find their solutions on the basis of the existing methods, on condition that the judge be equal to his eminent position.

The effort of which the action is considered as having come to an end in the [Muslim] orthodoxy is a special effort. Orthodox Muslims do not accept that every erudite person be at liberty to create under his guise new rules, new procedures of utilizing them at his own convenience in the search of juridical and judicial truths and solutions. They fear the distractions of the human spirit, the dissidences of the jurists, schisms and conflicts that would result from such actions, for no plausible necessity or reason, through the multiplication of [school] methods. They leave jurisconsults free to follow one of the four methods,¹ in the application of the rules contained therein. They acknowledge that the door of *ijtihad* is still open for the research done following the four methods, but they consider the door to be closed for those who pretend seeking to create a fifth

¹ By the four sources of Islamic law, Savvas understands: the Koran, the *Sunnah*, consensus and legal analogy.

method and thereby bring about a revolution in the science of law and in jurisprudence.¹

The limits of which Savvas speaks are still present to date, in spite of the fact that contemporary Muslim authors deny the closure of the door of *ijtihad* or ask for its re-opening. Those who do not respect these limits pay with their life for their audacity, as was the case for the Sudanese Mahmud Muhammad Taha, hanged in 1985 for having presented a new theory concerning abrogation. We shall come back to this later.² To make up for the danger constituted by some "none disciplined" spirits, 'Abd-al-Wahhab Khallaf goes as far as refusing individuals the right to practice *ijtihad*. This, for him, is the cause of the legislative disorder in Islamic law. The *Ijtihad* should be limited, for him, to what he calls the legislative community (*al-jama'ah al-tashri'yyah*) of which each individual fulfils the above mentioned conditions of being a *mujtahid*. He also demands that the *mujtahid* remains within the framework of the method and the means recognized by Islamic law.³

3) Imitation

A) Who can imitate who?

The *Ijtihad* is not accessible to all. It follows that for certain questions and for the majority of the people, it should be necessary to follow the opinion of someone else. It is an imitation (*taqlid*) which signifies linguistically the fact of wearing a collar around the neck, by extension, adopting the opinion of a *mujtahid* and following without knowing the theoretical basis of his opinion. Accepting the hadith of Muhammad has nothing to do with this concept because the word of Muhammad is a basis of *ijtihad* in itself. The fact of accepting the opinion of the other while recognizing its basis and approving of it has nothing to do with the concept either.

The *mujtahid*, in principal, has no right to imitate another *mujtahid*. He is under the obligation to exert the effort (*ijtihad*) himself and must apply to himself the results of his *ijtihad*. His opinion is equivalent to the norm of God; he cannot abandon it in favour of another person's opinion, because he who knows something must act accordingly. That would not be the case were the *mujtahid* doubtful about his own position. In that case, he is to address himself to someone else who is more knowledgeable, in accordance with the verse:

We did not send before you but men to whom we reveal. So ask the people of the remembrance if you do not know (73/21:7).

Some accept that the *mujtahid* can address himself to another person if he did not have the time to exert the effort himself. By contrast, he who is incapable of practicing *ijtihad* is under the obligation to address himself to the one who is capable. The legitimacy of this attitude follows from the fact that it is impossible that each individual be capable of attaining the title of *mujtahid*. To ask for it would be to expose human beings to a great difficulty and would be contrary to the principle

¹ Savvas, Part I, chapter I, p. 145-146.

² See Part IV, chapter I.III.3.

³ Khallaf: *Masadir*, p. 13.

enounced by the verse 103/22:78: "He has not laid upon you in religion any hardship." The Koran says:

When it is said to them: "Come to what God descended and to the messenger," they say: "What we found at our fathers is sufficient for us." Even though their fathers do not know anything and are not guided? (112/5:104)

The verse condemns imitation when it is a question of following someone ignorant. *A contrario*, imitation of one who is knowledgeable is not to be condemned. They cite finally the above-mentioned verses 70/16:43 and 73/21:7. They conclude that one has the right to imitate one who is more knowledgeable than himself; and, for some, such a one must be alive, since one cannot ask the opinion of a dead person.

He who asks the opinion of a *mujtahid* can apply it or can ask the opinion of another *mujtahid* and follow the one he so wishes, unless he has already applied the first opinion; in that case, he has no right to opt for the second one, to avoid that there be contradiction in action. He must, however, in case of contradiction in the opinions, follow the opinion of the most knowledgeable and the most pious. If the two are of the same level, then he can choose, according to some, the easiest solution; for others on the contrary, the most demanding solution.

B) Domain and extent of the imitation

For some, one has no right to believe in religious dogmas by imitation and the simple opinions of the other. But they accept that the common run of the people should rely on the opinion of the learned if they have no doubt about what has been transmitted. If, on the contrary, they have some doubts, that is not sufficient for them.

For others, imitation would be allowed, even obligatory, when it concerns dogmatic norms and basic principles which do not fall under the influence of *ijtihad*. Such concepts, according to some, should not be questioned. As for other domains, imitation is only allowed for the ignorant. Some, however, demand that even the ignorant exert some effort in order to understand what he is doing.

Jurists also asked themselves the question whether one has the right to imitate an *imam* other than the one to whom one adheres and whether one has the right to follow an *imam* concerning one question; and, concerning another question, another *imam*. Opinions also diverge for the Sunnites with regard to the right to have recourse to an opinion of an *imam* outside their four *imams*.

A compilation of the norms of the different schools in the same institution can lead to some sort of a patchwork consisting of juxtaposing the norms in order to reach the result no *imam* would have authorized. One speaks of *talfiq* or *huqum murakkab*. Such a compilation is forbidden, if it aims at satisfying personal desires, without any other valuable reason, thus opening the way to all sorts of abuses. Several clarifications have been advanced:

- Basic dogmas and principles cannot be the object of divergence, in the *ijtihad* or in the compilation.
- Religious norms are based on ease and tolerance. Nothing stops the compilation of the norms in order to render them easier, since they do not affect the rights of

others. This would be the case for the religious tithe for the poor. It would be difficult to choose norms in order to render the law obsolete.

- Norms establishing prohibitions can only be compiled but in case of necessity. Muhammad is cited as having said: "When the prohibited and the permitted are united, the forbidden prevails;" "Abandon what you doubt in favour of that over which you have no doubt." Again, this should not be done at the expense of the rights of others.
- Norms related to the relations among people (marriage, contracts, etc.) can be the object of compilation on condition that this be among the objectives of the institution in question. Compilation should not be used to destroy the marriage and to render the children and the spouse miserable. An example is given of someone who would marry without a guardian according to the Hanafite school, and without any witness, according to the Shafi'ite school. Such a marriage is considered invalid.

To be added to the above distinctions is the prohibition of the compilation which violates the norm established by the authorities, because it favours legislative anarchy, or one which consists in imitating and, afterwards, going back on one's decision in order to follow another.

The question has legislative implications. Most of the Muslim States prescribe in their laws the necessity to have recourse to a given school in order to fill in the gap, but such States allow themselves to establish their laws on the basis of the different schools. This follows from the need for the State to legitimize the norms it establishes, even outside the official school.

4) Divergences in *ijtihad*

If we accept that there cannot be any divergence in matters well known in religion (*ma 'ulima min al-din bil-darurah*) and that the truth in this domain is one and unique, then all the rest can be the object of diverging opinions. The one who wants to have a solution to a given problem has the choice between the different opinions. "Divergence of opinions is mercy," says a hadith of Muhammad.

A trend of thought called *al-musawwibah* considers every opinion as being true and each person must follow the opinion he thinks to be right. The Koran says in this regard: "God never burdens a soul beyond its means" (87/2:286). Another trend of thought called *al-mukhatti'ah* considers only one opinion to be true, and all the others as false. He who reaches the true solution has the truth and the one who does not is in error, but is excusable. Both, however, deserve a merit. Muhammad said: "If a governor makes an effort to reason and attains a true opinion, he has two merits; but if he makes a mistake he has one merit."

In fact, the two trends of thought agree with one another; the first one means to say that the person who reaches an opinion is bound by the opinion even if it is objectively wrong. They, however, refused to extend the argument to the non-Muslims who refuse to adhere to Islam. They cannot morally evoke their incapacity to attain the truth represented by Islam. They cite two Koranic verses against them:

The day when God will resurrect them all, they will swear to him as they swear you, thinking to have something [valid]. It is they who are the liars (105/58:18).

That was the presumption you presumed about your Lord, that has ruined you, and thus you became of the losers (61/41:23).

They also consider that *ijtihad* is not of universal import, applicable at all times and in all places. Every region and every period of time can reach an opinion that is suitable for it, according to circumstances. It is narrated in this respect that 'Umar Ibn 'Abd-al-'Aziz (d. 720) used to accept the testimony of a single witness who had taken an oath, considering the oath as a substitute to the second testimony. When he was appointed Caliph and found himself in Damascus, he demanded two witnesses (two men or a man and two women). He justified the change saying: "We found the people of Damascus different from those of Medina." Abu-Hanifah (d. 767) had in the beginning admitted that Persians could read the Koran in Persian during prayers as long as they had difficulty pronouncing it in Arabic, on condition that they did not do it out of sectarian spirit. But as soon as they had learnt Arabic he went back on his decision, fearing the multiplication of sects. Iyad Ibn 'Abd-Allah, judge of Egypt, had written to Caliph 'Umar Ibn 'Abd-al-'Aziz (d. 720) asking him to solve a problem. The Caliph responded to him that he knew nothing and the matter was left to the judge so that he could rule according to his own opinion. The example of the Imam Malik (d. 795) is cited: The Caliph Al-Mansur (d. 775) asked him to write a piece of work leaving aside the subterfuges of Ibn-'Abbas (d. 686) and the rigour of Ibn-'Umar (d. 693). Malik then wrote the *Muwatta'* which the Caliph wanted to impose on all the Muslim regions, but Malik advised against the initiative because each region had its proper sources for the *Sunnah* which it followed and in which it believed. Hence the Caliph renounced his project.

5) Turnabout in *ijtihad*

What should be done if a *mujtahid* gives an opinion and, later, he reaches a contrary opinion? Different scenarios are to be distinguished:

A) *Ijtihad* of the judge

If the *mujtahid* is a judge and he subsequently emits another contrary opinion or another judge does so, it is not allowed to nullify the first opinion. This is motivated by the surety in the judgments. If the way was laid open for the nullification of preceding opinions nothing would stop a third opinion from nullifying the two preceding opinions. This would lead to incertitude and a vicious circle of reciprocal quashing.

This rule, however, underwent different exceptions. Thus, it is possible to nullify an opinion if it violates a clear text, a norm established through unanimity or a norm established through analogy. In that case, it is not a question of nullification of an opinion by another opinion, but rather by a definite proof (*qat'i*). It is narrated in this regard that 'Umar (d. 644) asked a plaintiff for information about a judicial matter. He informed him about the decision taken by the judge. 'Umar answered back saying were he the judge he would have decided otherwise. The plaintiff told him: "And what stops you from doing it now?" 'Umar responded: "If I could refer myself to the Book of God and the *Sunnah*, I would do it, I am only expressing my

proper opinion on the matter, and every judge has his own opinion." It is also narrated that 'Umar made a decision about a matter and a different decision about a similar matter the year after. He was reminded about his previous decision. He answered: "The decision of last year was of last year, and the one of today is of today. He thus maintained the two contradictory decisions.

Similarly, it is possible to nullify an opinion of a judge in the following cases:

- If he proceeds by imitation and not by exerting effort, since a *mujtahid* should not imitate another *mujtahid*.
- If he proceeds by imitating an *imam* such as Al-Shafi'i (d. 820) but does not respect the texts of the latter in his own opinion without having reached the level of *ijtihad*.
- If he proceeds by imitating an *imam* other than the one to whom he is affiliated, in the domains where he is not allowed to change the *imam*.

B) Ijtihad with regard to oneself

If a *mujtahid* arrives at an opinion to govern his own acts and subsequently changes his opinion, he must then adapt himself to the new opinion. Thus, if he marries a woman thinking that it is not necessary to involve her guardian and then he goes back on his decision, he must leave his wife, if not he is in an illicit situation. The same rule applies also to the one who imitates him. Thus, if the *mufti* offers to the person consulting him an opinion based on *ijtihad* and, subsequently, he changes his opinion, he is obliged to inform the person consulting him about the change in his opinion.

C) Ijtihad between two mujtahids

A man and a woman, both of whom are capable of practicing *ijtihad* get married. The husband repudiates his wife and considers later that the repudiation was invalid while the wife thinks the contrary. The husband, in that case, thinks it right for him to have sexual intercourse with his wife and the wife holds a contrary opinion. The solution would be that they subject their dispute to a judge whose decision they will have to follow.

IV. Fatwa as domain of ijtihad

Still today, *ijtihad* continues to play an important role, notably through the *fatwa* (religious decision) institution and in conformity with Islamic law. A lot of people remember the *fatwa* of Imam Al-Khomeini the 13 February 1989 condemning Salman Rushdie to death following his book *The Satanic verses*. But this is neither the sole usage made of the Muslim institution nor the only way through which Muslim religious authorities exercise their influence within as well as outside Islamic countries. It is therefore important to dwell at length on this institution.¹

¹ Concerning this institute, see in particular Aldeeb Abu-Sahlieh: *L'institution du mufti*; Walsch: *Fatwa*; Tyan: *Histoire de l'organisation judiciaire*, p. 219-230; Al-Qasimi: *Al-fatwa fil-islam*; Ibn-al-Salah: *Adab al-mufti*; Al-Khatib: *Kitab al-faqih*; Al-Imadi: *Salah al-'alam*; Al-Nawawi: *Adab al-fatwa*; Al-Qaradawi: *Al-fatwa*; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*.

1) Meaning and importance of the *fatwa*

A) *Meaning*

The *fatwa* is an opinion issued by a *mufti*, an expert of Islam, following a consultation by individuals or official organs to know the exact position to adopt, on a religious, juridical or political level, in order to be in conformity with Islam.

The Koran uses eleven times the verb *fata* under its different forms to indicate the fact of asking/giving to someone a response concerning a particular matter.¹ Let us cite two of such verses:

They ask you a decision about women. Say: God gives you his decision about them... (92/4:127).

They ask you a decision. Say: "God gives you his decision about [the absence] of heirs in the direct line. If a man dies childless and has a sister, she shall have half of what he leaves (92/4:176).

The recourse to the *mufti* by the Koran is legitimized:

We did not send before you but men to whom we reveal. So ask the people of the remembrance if you do not know (70/16:43; repeated in 73/21:7).

B) *Importance*

As can be seen in the two above-mentioned verses 92/4:127 and 92/4:176, God acts as a *mufti*, one who answers. He teaches Muhammad what response to give. This was possible during the time of revelation. After the death of Muhammad who put an end to the revelation, it was necessary to find someone who could answer the questions the revelation had left open or to which it did not give a clear response. Caliphs and Muslim religious scholars fulfilled this role. The one who responds to the questions becomes, in the eyes of Muslim jurists, the substitute of God, knowledgeable of his will, the provider of his instructions, heir of the prophets. Ibn-Qayyim Al-Jawziyyah (d. 1351) summarized the idea in the title he gave to his book '*lam al-muwaqqi'in 'an Rab al-'alamin* (Instruction of the signatories on behalf of the Master of the universe).

Asking for the *fatwa* of a *mufti* is a moral obligation, with implications that are at times juridical with regard to the other,² for the believer who wants to live in conformity with his religion. Classic works even affirm that if the requester does not find a competent *mufti* he must undertake the journey of searching for one, even outside his own country. And if, in spite of that, he finds no one to teach him, the requester would then be in the historical situation preceding the revelation (*jahiliyyah*); he cannot be responsible for his acts whatever he does.³

¹ Koran 4:127 (2 times); 4:176 (2 times); 12:46; 12:41; 12:43; 18:22; 48/27:32; 56/37:11; 56/37:149.

² It is particularly in the field of marriage and repudiation that the *fatwa* has had juridical impact on the other, since man, when he marries or repudiates his wife, acts as a master of situation, without the need of State intervention. But before acting, it happens often that he consults a *mufti* who tells him what attitude to have.

³ This position reminds us of the principle *Nullum crimen, nulla poena sine lege*.

As a corollary to the obligation of the requester, it is indispensable that every society should have a *mufti*. The absence of such a personality renders the whole of society sinful. One has no right to live in a country which does not have a *mufti*. The importance of the institution is illustrated by the Koran which exempts certain people responsible for instructing others in matters of religion from the duty of participating in war (113/9:122).

On the other hand, the *mufti* is bound, morally, to answer the question brought before him if there are no other *muftis* existing in the region. If there are other *muftis*, his response becomes facultative. The obligation to issue a *fatwa* is based on the Koranic verse:

Those who conceal the proofs and the guidance that we descended after we made it manifest to the humans in the book, those, God curses them and the cursers curse them (87/2:159).

A hadith of Muhammad is cited:

He who asked concerning knowledge and hides it, will be bridled the day of resurrection with the bridle of fire.

The *fatwa* is in principle free of charge. Demanding money in exchange of *fatwa* is equivalent to simony. It is, however, tolerated that a *mufti* accepts a salary inhabitants of his circumscription have agreed upon to give him, just as, having been appointed by the State, he can benefit from the treatment that goes with his responsibility. Some have recourse to ruse; oral *fatwa* is free of charge, but if the requester wants it in written form he can lease the services of the *mufti*.

C) Domains of the mufti

The *mufti* had a very important role at the beginning of Islam, with its territorial expansion and the new converts being desirous of knowing the norms of their new religion in the absence of a legislator in the modern sense of the term. Yesterday, like today, every person has the right to establish himself as *mufti*, by qualifying himself in the eyes of the public through his juridical and religious knowledge. The liberty given to individuals flows from the absence of a clerical class established by the Muslim religion.

The supreme authority, aware of the considerable influence exerted by the religious scholars, took care of instituting by itself jurists responsible for the *fatwa*. Thus, the Caliph 'Umar Ibn 'Abd-al-'Aziz (d. 720) designated three people to whom he gave the responsibility for the *fatwa* in Egypt. Two of them were indigenous and the third was of Arab origin. The public authority, by the designation of the legal experts, was only responding in anticipation to the needs of the population. The *mufti*, even if he is designated by the public authorities, like the *mufti* of the ottoman epoch, who had become a true public official, remains still at the service of private individuals. The tradition has been maintained to date.

Ibn-Khaldun (d. 1406) cites among the six public functions of religious character the responsibility over the *fatwa*, after prayer and before jurisdiction. He distinguishes between legal experts of the principal urban mosques and of secondary mosques. *Muftis* who receive people, at home or other places, in particular, can be

assimilated to the latter. Authorities reserve themselves the right to appoint the legal experts who must play this role, treating them in the same manner as other State officials.¹

Thanks to the responses of the *muftis* over the centuries, doctrine adapted itself to the practice and the juridical evolution, thus quietly accomplishing itself. The responses were recorded in collections of which a great number has been conserved and published nowadays. The collections serve as source for law still today.² All know the influence of Shaykh Muhammad 'Abduh (d. 1905) *mufti* of Egypt from 1900 to 1905, on the reform of family law.

Besides the doctrinal role, very often tribunals have recourse to the *muftis* to obtain their *fatwa* in the trials. But the recourse is facultative. The judge, on the other hand, is not bound to follow the *fatwa* of the *mufti*.

D) Abuse and regulation

As can be imagined, the *fatwa* institution has been the object of abuses. People without any knowledge undertook to inform the public. The phenomenon, also highlighted by classic authors, recurs today through the invasion of the book market, with numerous publications containing *fatwas* in all the domains.

On the political level, everyone knows the danger represented by *fatwas* published or diffused by radio, television and other technical means in the formation of public opinion. The government, as well as the opposition, not to mention religious groups of all tendencies, makes use of such *fatwas* to channel their opinion.

In order to reduce such abuses of the institution, classic and contemporary authors have established rules which the *mufti*, as well as the requester, must respect. We will come back to this later.

In order to dissuade some people from indulging in the practice of the *fatwas*, classic and contemporary authors demand the public authority to intervene, notably against ignorant *muftis*.³ And, as such an intervention can be considered a breach of the liberty of the *mufti*, they insist more on the moral constraint. They cite Muhammad who said that the person who hurries to give the *fatwas* hurries towards hell. They point out the example of the companions of Muhammad who used to refuse to respond to questions and preferred to send the requester to others, out of humility and to avoid their moral responsibility implied by the exercise of such a function. He who responds to every question that is addressed to him is called a fool. The top judges were not bothered to respond to the questions, saying: "I do not know" or "I ignore." Abu-Hanifah (d. 767) used to say: "If I did not fear the

¹ http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter3/Ch_3_29.htm.

² We point out here *Majmu' fatawa shaykh al-islam Ahmad Ibn-Taymiyyah* (37 volumes), *Al-fatawa al-hindiyyah* (6 volumes) and the work of Al-Wansharisi entitled *Al-mi'yar al-mu'rib* (13 volumes). In more recent times, the Egyptian Ministry of *Waqf* published a collection assembling important fatwas issued since 21st November 1895. Nineteen volumes have been published until now under the title *al-fatawa al-islamiyyah min dar al-ifta' al-masriyyah*.

³ Al-Nawawi: *Adab al-fatwa*, p. 17-18; Al-Qasimi: *Al-fatwa fil-islam*, p. 150-151.

loss of science, I would have abstained from responding to the questions."¹ In order to exonerate the *muftis*, Muslim jurists say: "He who says I do not know is like the one who issues a *fatwa*." Thus, the *mufti* could not force himself to issue *fatwas* wildly, thinking that he had the duty to respond to his requester.

E) Fatwa between fundamentalism and modernism

We have pointed out above the important role played by the *mufti*. Al-Qaradawi, a very popular contemporary *mufti*, raises the problem represented by the two trends of the *mufti*: fundamentalist and modernist.

Fundamentalist *muftis* deny that society is subjected to the law of evolution. They base themselves on ancient books and ancient *fatwas*. Al-Qaradawi cites as example those who reject the testimony of those who shave their beard, forbid women from going to the mosque in order to avoid temptation, refuse the use of modern instruments to determine the appearance of the moon for the beginning of the fasting of Ramadan, etc. Ibn-Qayyim Al-Jawziyyah (d. 1350), already during the 14th century, had warned against the conservative attitude, which does not in any way take into consideration the evolution of society. Classic authors themselves modified their teaching in order to adapt it to society.²

Such a defence against the conservatives, however, should not deceive us. Modernists are also the object of even more virulent criticisms. The modernist, explains Al-Qaradawi, lured by the material success of the West, tries to imitate it. Yet, laws of the West are based on its philosophy and its religious and existential concept. Thus, Al-Qaradawi rejects the pretext advanced by the modernists in view of legalizing bank interests, insurances or equality between men and women in matters of succession. Some of the modernists endeavour to create norms, to justify the state of affairs created by the colonizers, or to conform to it. Such compromises, he says, are not acceptable. Instead of submitting Islamic law to reality, the reality must be changed in order to adapt it to Islamic law.³

2) Rules governing the institution of the *mufti*

It is rare to find among the current laws all the rules which govern the institution of the *mufti*. For that reason, we cite here the classic rules to which contemporary works refer.⁴

A) Conditions for the aptitude of the *mufti*

- The *mufti* must be a Muslim, since the function of the *mufti* is of religious character.
- He must be an adult. The condition is so evident that the classic authors neglect to mention it. It is included among the conditions of the quality of the *mujtahid*. Above the age of reason, there is no inconvenience for a young man in posses-

¹ Al-'Imadi: *Salah al-'alam*, p. 30-36; Al-Nawawi: *Adab al-fatwa*, p. 13-18; Ibn-al-Salah: *Adab al-mufti*, p. 71-85; Al-Qasimi: *Al-fatwa fil-islam*, p. 44-45.

² Al-Qaradawi: *Al-fatwa*, p. 90-103.

³ *Ibid.*, p. 82-90 and 124-127.

⁴ Al-Nawawi: *Adab al-fatwa*, p. 19-22; Ibn-al-Salah: *Adab al-mufti*, p. 85-109; Al-Qasimi: *Al-fatwa fil-islam*, p. 56-62; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 258-260.

sion of the necessary juridical knowledge, to devote himself to the profession. For the Syrian law the *mufti* must be 30 years old.

- He must be equitable (*'adl*). The condition is interpreted here more rigorously than in matters of jurisdiction. Whereas doctrine, supervising the lowering of the level of the public morality, accepts the validity of the appointment of an impious (*fasiq*) judge, it continues to teach that an impious man cannot be recognized as a *mufti*. A contrary opinion is, however, upheld by some authors.
- He must be a *mujtahid*, that is in possession of juridical science and capable of providing, through personal reasoning, exact solutions to juridical problems. But, whereas it is acceptable to appoint an ignorant judge, it is not acceptable to appoint an ignorant *mufti*. Because an ignorant judge can have recourse to the *fatwa* of a *mufti* whereas the latter must have recourse to his own personal knowledge in order to give a useful opinion. It follows that the *mufti* must at least be capable of searching in the writings of renowned jurists for solutions to the juridical questions addressed to him. Nowadays, in Jordan and in Syria, it is requested that the *mufti* be in possession of a diploma from the faculty of Islamic law.
- It is not necessary that the *mufti* be a man, a faculty which is purely theoretical, since there has not been, it seems, any example of a woman who exercised the profession of a *mufti*. Similarly, blindness and dumbness do not constitute a hindrance to the formulation of the *fatwa*.
- The status of liberty is not necessary. In the past, a slave could be a *mufti* since the condition of liberty was only required for those who exercised a public function. That would signify that the *mufti* appointed by the State must be free, but not the private *mufti*.
- According to some, it would not be possible to cumulate the function of the *mufti* and that of the judge. But it is acceptable that the judge be consulted in religious matters. The dominant doctrine affirms, however, that the only restriction consists in the fact that it is forbidden for the judge to deliver consultations to plaintiffs who have already referred their dispute to him.
- The fact that the requester and the *mufti* are related does not constitute a hindrance, since the *fatwa* of the *mufti* is not binding. He must not, however, be an adversary of the requester.

B) Personal qualities of a mufti

Besides the preceding conditions, the *mufti* must fulfil personal conditions.¹

- A *mufti* must be well-intentioned, good intention being considered to be the central point in each act. It confers on the *mufti* a certain charisma.
- He must be composed (*halim*), respectable (*lahu waqar*) and calm (*lahu sa-kinah*). He must abstain from issuing a *fatwa* while in an emotional state; anger,

¹ Al-Nawawi: *Adab al-fatwa*, p. 17 and 38-39; Ibn-al-Salah: *Adab al-mufti*, p. 113; Al-Qasimi: *Al-fatwa fil-islam*, p. 77, 145-146 and 174; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 250-258 and 284.

hunger, sadness, excessive joy, sleep, boredom, torrid heat, painful sickness or any other state that impedes moderation.

- In order that people may not corrupt him, it is recommended that the *mufti* should not be needy. Similarly, he must know the people, their tricks, their malice and their customs.
- As for judicial functions, the *mufti* must avoid seeking the function; he must wait to be called upon, out of his own merit and the need of the city.

C) Formal rules for the fatwa

Jurists have established rules of procedure to be respected by the *mufti*.¹

- A *mufti* must deal with the questions addressed to him in a chronological order. Should he forget the date when two questions were submitted, he can draw lots. However, he can give preference to a woman or a traveller coming from far. If there are several women or several travellers, he will proceed according to the chronological order or by drawing lots.
- A *mufti* must read carefully and up to the end the paper containing the question, because the question appears at the bottom. If he does not understand the question, he should ask for clarifications. In case of a serious mistake in the question, he should opt for the most favourable meaning. Should there be space between the lines or at the end, he should draw a line so that the requester cannot add words later to condition the response.
- It is preferable that the *mufti* reads the question to those present who are knowledgeable about the matter, discussing the question with them and asking their advice "with kindness and equity," even where they are more or less knowledgeable than himself. He must, nonetheless, abstain if the requester wishes that the question be kept a secret or if disclosure of the matter can have bad consequences.
- If the requester is slow in understanding, he should be patient with him and endeavour to understand him. This attitude is commendable. If the question is not clear and the requester is not present in order to be asked for clarifications, the *mufti* will note by writing on the paper that was submitted to him that he needs more information or to ask the author to come forth and explain the question by himself. If in spite of that he does not understand the question, he can abstain, either by proposing to the requester another *mufti*. If the request comprises several questions, some understood others not understood, the *mufti* will respond to those that he has understood and leave aside those that he has not understood.
- The response must correspond to the question. The *mufti* cannot present data known by him if this data is not contained in the question asked. He may, however, after providing the response, foresee a case where the situation would be different from the way posed in the question.

¹ Al-Nawawi: *Adab al-fatwa*, 45-63; Al-Qasimi: *Al-fatwa fil-islam*, p. 87-94 and 97; Ibn-al-Salah: *Adab al-mufti*, p. 134-145; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 219.

- The response can be oral¹ or written. It is not convenient that the response be written by the *mufti*, but it can be dictated by him. If the paper contains several questions, it is preferable that the response be in the order of the questions.
- The response must be presented in average legible writing, neither fine nor thick, with average interline, neither too spaced nor too close. The expression must be clear, correct, comprehensible to the ordinary mortals and not denigrated by specialists. It is preferable that the style of the writing or the pen not be changed in the course of the writing, out of fear of falsification or doubt. The response must be re-read to avoid mistakes.
- The writing is done either on the left or on the right or in the middle of the paper. But the *mufti* should not write above the initial religious formula: "In the name of God, most Gracious, most Compassionate." Before reading, he must start by calling upon the help of God. He must also ask for the recourse to God against the devil, pronounce the name of God, praise him and pray for Muhammad.
- The *mufti* can start his *fatwa* by different religious formulas: "Success comes from God," "*Al-hamdu lillah*," etc. He concludes with other formulas, such as: "Success comes from God" or "God knows best," followed by his name: such a son of such, indicating his tribe, his town or his position, adding his school: Shafi'ite, Hanafite, etc. If the *fatwa* concerns a governor or another man of authority, some wish that the *fatwa* starts by an invocation of God in his favour: May God strengthen him, give him support, etc.

D) Basic rules of the fatwa

Besides rules of procedure, the *fatwa* is subjected to some basic rules.²

- The response of the *mufti* must be short and comprehensible for the public. Some *muftis* used to respond by yes or no. But it is preferable to explain in detail the response. Thus, if the question concerns a foreseen penalty for robbery or other offences, it is not enough to mention the penalty; it is necessary to point out the conditions for the application of such a penalty.
- The *mufti* must not seek to please the requester, but he should give him the exact response. He cannot, for example, limit himself to the part of the *fatwa* convenient for the requester, leaving aside the part that displeases him. He must avoid indicating to him loopholes allowing him to circumvent Muslim norms. The *mufti* must, however, renounce writing a *fatwa* which is not to the taste of the requester, but he cannot in any way avoid telling him. The *mufti* can use strong words in his response in order to incite the requester not to commit the crime.

¹ During my visit to the Ministry of Justice of the Sultanate of Oman (March 1990), the substitute of the *Mufti*, an elderly man, used to respond by phone to the questions people were asking him. The questions concerned mainly matters related to marriage and succession. The consultation would hardly last a minute.

² Al-Nawawi: *Adab al-fatwa*, p. 37-38, 43-45, 60 and 66-68; Ibn-al-Salah: *Adab al-mufti*, p. 120-134 and 141-157; Al-Qasimi: *Al-fatwa fil-islam*, p. 79, 81, 96-100, 134, 148-149, 164-168; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 225-227, 244-245, 270-278, 284-326.

- If the paper submitted to the *mufti* contains a response from another competent *mufti*, he can add that he confirms the already issued *fatwa*. If the *mufti* is not competent, he can indicate that the issued *fatwa* should not be followed. He can even blame the requester for having had recourse to someone ignorant. If the first *fatwa* is from a known *mufti*, he should get informed about the person. If he does not obtain a clear idea about the *mufti*, he can abstain from issuing the *fatwa*. If, on the contrary, the *fatwa* is issued by a competent *mufti*, but contains a blatant mistake, the new *mufti* can have the first *fatwa* torn off or add to it his contrary *fatwa*. For some, the *mufti* should not attack other *muftis*, but he should simply express his *fatwa*, confirming or invalidating the *fatwa* submitted to him.
- The *mufti* is only bound to motivate his *fatwa* if it is intended for a judge or if he gives a *fatwa* contrary to another *fatwa*. If the question concerns complicated theological domains or controversial Koranic verses, the *mufti* must avoid going into details, but he should invite the requester, on the contrary, to limit himself to faith. He can also leave aside such questions. The *mufti* must avoid pronouncing himself over a matter comprising terms or customs proper to a region different from his, unless he is capable of clearly seizing their sense and their content. He must also avoid answering to hypothetical cases, in order to avoid futile speculation.
- The *mufti* must avoid giving ambiguous responses in order not to embarrass the public; to treat others as unbelievers, except on the basis of a clear text; to express himself in absolute terms even if the jurists are unanimous over the matter, for often unanimous solutions hide divergences.
- The *mufti* must not limit himself to exposing the point of view of his school. If he finds that the position of one school is more correct, he is bound to point it out to his requester, for the response must always conform to intimate conviction.
- In case the question would have two or more responses, the *mufti*, according to some, can give the response he wishes. Others prefer that the *mufti* indicates the different responses to the requester, leaving to the latter the choice. Ibn-Qayyim Al-Jawziyyah (d. 1350) advised the *mufti* not to give any response until he was sure that his was the exact response. Abu-Zahrah (d. 1974) gives two examples of a good *fatwa* for the same case. A man wants to get married to his foster sister, the *mufti* should forbid him according to the majority opinion. But if a married man with children discovers that he married his foster sister and he asks himself, is he a fornicator? Must he abandon his wife? The *mufti* should reassure him by giving him the minority opinion and he will preserve his family.

E) Rules to be respected by the requester of the fatwa

The requester of a *fatwa* is any person who has not reached the degree of the *mufti* in responding to questions he asks himself. Several rules concern him.¹

¹ Al-Nawawi: *Adab al-fatwa*, p. 35-37, 43 and 71-86; Ibn-al-Salah: *Adab al-mufti*, p. 109-110, 157-171; Al-Qasimi: *Al-fatwa fil-islam*, p. 75-76, 81 and 101-113; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 270, 278-281, 316, and 323-328.

- He must assure himself about the competence of the *mufti* he is consulting. Some affirm that it is enough that the *mufti* be well-known as being competent; others are satisfied with the *mufti* who says he is competent. In the presence of several possible *muftis*, the requester must choose the most competent and the most pious. And if he wishes to ask several *muftis*, he must start by the oldest and the most competent. Can one have recourse to a *mufti* in a matter that he masters when he is ignorant in other matters? Some accept, others do not, due to the fact that norms are often linked with one another.
- Should one look for a *mufti* of his own school? Jurists answer that the ordinary mortal *per se* does not belong to any school. For this reason, he is free to consult whoever he wants. But he should avoid determining his choice by the school that would be more favourable to the question he is asking himself.
- The requester should only apply the *fatwa* if he is personally convinced that it is right. Muhammad said: "Ask for the *fatwa* from yourself even if others have given you theirs." The *fatwa* issued by others does not free one from his responsibility before God. If the requester has doubts concerning the *fatwa*, he must address himself to other *muftis* to have their *fatwa*. But if in the country there is no other *mufti*, he can then give up, for God does not ask from a person more than is possible.
- If the question was consecutively dealt with by two *muftis*, several attitudes are advised: to opt for the hardest position or, on the contrary, the easiest; address oneself to a third *mufti* and follow his *fatwa*; choose the *fatwa* one wants or the *fatwa* of the person who appears to be the most competent.
- If the *mufti* issues a *fatwa* on a matter and then decides against the *fatwa*, the requester is obliged to follow the last *fatwa*. Al-Hasan Ibn-Ziyad (d. 820), the friend of the great Imam Abu-Hanifah (d. 767), gave a *fatwa* and then realized his mistake. But as he did not know the requester, he hired a wailer. He abstained from issuing *fatwas* for several days until he found the requester. According to Ibn-Qayyim Al-Jawziyyah, (d. 1350), if the *mufti* changes the *fatwa*, the requester must address himself to another *mufti* and follow the *fatwa* issued by the latter. But if there are no other *muftis* in the country, the requester must go back to the *mufti* and ask him for the reason of the changing of his *fatwa*. If the change is motivated by the mistake of the *mufti*, the requester is obliged to adhere to the second *fatwa*. Nonetheless, if the change was based on the appreciation of the judge or an option for another school, the requester can follow one or the other *fatwa*.
- If the question had been resolved by a *mufti* and it recurs, it is not necessary to ask the *mufti* again. Some, however, recommend doing so because the *mufti* may have changed his opinion. For the same reason, some jurists do not accept that a person applies the *fatwa* of deceased *mufti*.

F) Responsibility of the mufti

If it is proved that the *mufti* did carry out his duty to do research, he will answer for the damage he causes through his *fatwa*, especially if he is incompetent. But if he did his research seriously, the wronged requester must be compensated by the pub-

lic treasury.¹ Jad al-Haq (d. 1996) is of such an opinion. According to Ibn-al-Salah (d. 1245), the *mufti* is answerable for the damage caused only if he is competent. If he is not competent, the fault lies with the requester who did not choose well his *mufti*.² But what would the case be should the judge ask the point of view of a *mufti* and realize later that the *mufti* was mistaken? In that case, the responsibility preferably lies with the judge because the *mufti* does not give a constraining *fatwa*.³

3) Modern role of the *mufti* in Muslim countries

The *mufti* continues to play an important role, as much in the daily life of the people as in the higher spheres of power. He is supposed to give the religious point of view in order to conform to it on the personal or economic institutions' level, or to justify a legislative, judicial or even a political decision.

A) On a personal level

Newspapers, periodicals and radio or television stations of Muslim countries put at the disposition of the public the service of religious and juridical consultation exactly like the title for the problem page in occidental magazines. Al-Qaradawi, a very popular contemporary *mufti*, says that he receives thousands of letters, in different domains, from different countries and from different categories of people; young and old, men and women, private and public. He deduces that religion is in the foreground. He adds that the lay people who pretend to eliminate religion from our society or endeavour to govern society through another law other than the law of God swim in fact against the current with regard to their people, imposing themselves through norms that they refuse. He points out that women are more interested in the question of religion than men. He explains this as being due to the gift of tenderness and the mercy God has given them which renders them closer to religion than men. He deduces that occidental influence on Muslim women is not definitive.⁴

On the economic level, the so called "Muslim" banking institutions have recourse to *fatwas*, in order to found their financial operations. *Fatwas* are published and put at the disposition of the public, thus becoming part of the marketing strategy of these institutions.

B) On the legislative level

The State has recourse to the *muftis* in order to obtain a *fatwa* before promulgating a law. We cite here, as an example, the question of female circumcision in Egypt. On September 7, 1994, CNN diffused during the *International conference on population and development* a film on the circumcision of a girl by a barber in an Egyptian working class area. The film provoked a lot of agitation in the Egyptian and international public opinion. Many books and articles came out on this occasion, either in favour or against female circumcision. In order to calm the storm, the minister of health promised to promulgate a law forbidding the practice. He therefore addressed himself to the *Mufti* of the Republic from whom he managed to

¹ *Al-fatawa al-islamiyyah*, vol. I, 1980, p. 24-26.

² Ibn-al-Salah: *Adab al-mufti*, p. 111.

³ Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in*, vol. 4, p. 280-284.

⁴ Al-Qaradawi: *Min huda al-islam*, 33-34.

obtain a *fatwa* favourable to his position. Then, he paid a visit to the Shaykh of Al-Azhar Jad al-Haq (d. 1996) to ask for his support. The latter gave him a booklet freely distributed as annex to the issue of October 1994 of Al-Azhar periodical. The booklet contained the *fatwa* of which the essentials had already been published in 1981. In the *fatwa*, the Shaykh affirmed, three times: "If a region ceases, in common accord, to practice male and female circumcision, the Head of the State will declare war against it because circumcision is part of the rituals of Islam and its specificity. This means that male and female circumcision is obligatory."¹ In front of such intransigence, the minister had to renounce the legal prohibition and content himself with allowing the practice in hospitals.² This provoked the anger of the opponents of female circumcision on local and international level, obliging the Minister to go back on his decision by sending on October 17, 1995 instructions to directors of the health sector of the districts forbidding the practice, the instructions were confirmed on July 8, 1996 by the decree no. 261.

C) On the judicial level

On the judicial level, tribunals have recourse to *muftis* in order to have their *fatwa* in trials. But the recourse is facultative. The judge, on the other hand, is not obliged to follow the *fatwa* of the *mufti*. It is, however, a domain in which recourse to the *mufti* is prescribed by law. The code for the Egyptian criminal procedure provides, through article 381, for the tribunal to seek the *fatwa* of the *Mufti* of the Republic before pronouncing the death penalty. Even though the *fatwa* of the *mufti* is not constraining for the judge, the sentence pronounced without consulting the *mufti* is null. The *fatwa* of the *mufti* must be issued within ten days, beyond which the judge is not bound to wait. According to the parliamentary legislative commission, the consultation of the *mufti* aims at "providing tranquillity to the condemned, knowing that the death penalty pronounced against him is in accordance with Islamic law." But it does not hide the will to influence the public. This is what seems to be the true reason, according to the doctrine that would have wished that the *fatwa* of the *mufti* be restrictive for the judge.³ Let us point out that the *fatwa* of Al-Khomeini (d. 1989) against Salman Rushdi is equivalent to a judgment. In Egypt, *fatwas* issued by the Muslim religious higher authority against the Bahai sect serve as a basis for arresting its members and their condemnation by the tribunal.⁴

Coming back to the question of circumcision, the turnabout of the Minister of health in 1996 against the practice of female circumcision had enraged its defenders. Dr Munir Fawzi and Shaykh Yusuf Al-Badri lodged a complaint with the administrative tribunal, asking it to declare the decree in question as being contrary to Islam and to the constitution, of which the latter considers the principles of Islamic law as the principle source of law. The tribunal agreed with them as the parliament was the only one authorized to adopt norms comprising penal sanction. The Minister of health appealed. The Prime Minister, the president of the trade-union of doctors and NGOs joined the action. On December 28, 1997 the Administrative Su-

¹ Jad-al-Haq, in Aldeeb Abu-Sahlieh: *Khitan*, annexes 5 and 6.

² Al-Nadim, p. 67.

³ Husni: *Sharh qanun al-'uqubat, al-qism al-'am*, 756-757.

⁴ Aldeeb Abu-Sahlieh: *Liberté religieuse and apostasie dans l'islam*, p. 50-51 and 69-70.

preme Court decided that the minister had acted within the limits of his competence. It added that the criminal code is applicable to the violation of physical integrity of girls through circumcision due to the fact that the latter has no foundation. It further decided:

There does not exist in matters of female circumcision a clear and obligatory Muslim norm based on the Koran or the *Sunnah* of Muhammad. *Imams* of the four Muslims schools and contemporary jurists have diverged in this domain as to know if it is a matter of duty or of a recommended act.

As a consequence, according to the court, the ministerial decree did not violate the constitution. It added:

As circumcision is a surgical operation without any Muslim norm imposing it, the basic norm requires that it should not be practiced without therapeutic reasons [...]. Surgery, whatever its nature or seriousness, done without the realization of conditions authorizing it, constitutes an illicit act on the level of Islamic law and positive law, in accordance with the general principle of the right of an individual to physical integrity, and the principle of the incrimination of every unauthorized act infringing on this integrity.

In the first, as in the second decision, the Egyptian tribunal based itself on different *fatwas* of Egyptian Muslim religious scholars to influence the first decision in favour of circumcision and the second against it.¹

D) On the political level

The *mufti* has influence in the domain of politics. He can justify or condemn the recourse to war or establishment of peace with an enemy country, as was the case for the peace between Egypt and Israel.² We can also cite the recourse to the *muftis* by Muslim countries involved in the Gulf crisis after the Iraqi invasion of Kuwait, be it for condemning or for justifying the occidental armed presence in Saudi Arabia and other countries hostile to Iraq. In spite of the impact the *fatwa* has on the public in such situations, we cannot prevent ourselves from seeing in the *mufti* a person at the service of the authorities. Effectively, it is rare to see a *mufti* oppose himself to the will of the Head of State. It is the most unrewarding and most difficult role the *mufti* plays in society.

E) State muftis

There are several works nowadays which talk about the institution of the *mufti* in general. Little is said about the State *Mufti*. It would be necessary, to fill the gap, to study law, jurisprudence and the practice of the different countries in this subject. We endeavour here to present, in summary form, the situation in Jordan, in Syria and in Egypt.

¹ See Aldeeb Abu-Sahlieh: *Circumcision*, p. 415-416.

² The agreement between Egypt and Israel was the object of a *fatwa* of Jad al-Haq 'Ali Jad al-Haq on 26 Nov. 1979 (in: *Al-fatawa al-islamiyyah*, vol. 10, 1983, pp. 3621-3636). There exists a *fatwa* of 8 January 1956, issued by Hasan Ma'mun, concerning peace with the Jews of Palestine and the treaties signed up with colonial States hostile to Arabs and to Muslims who sustain Jews in their aggressions (*Ibid.*, vol. 7, 1982, pp. 2643-2647). See also Al-Qalqili: *Al-fatawa al-urduniyyah*.

a) In Jordan

The *fatwa* organization directed by the Grand *Mufti* is part of the Ministry of *waqf*. Some *muftis*, subordinates of the Grand *Mufti*, are appointed in urban centres; they are university graduates. Besides issuing the *fatwas*, they must supervise the cult in mosques and the personnel: preachers, teachers of religion, etc. They must present to the Grand *Mufti* a monthly report of their *fatwas*, which are then to be registered, as along with the questions, in the register. The Grand *Mufti*, in his turn, must present his observations concerning the *fatwas* to the Ministry of *waqf*. They are officials of the State. The law specifies that they do not charge any fees (except their salaries) for their activities.

On the other hand, the Minister of *waqf* is comprised of the Commission of the *Fatwa*, composed of seven distinguished scholars in matters of Islamic law, appointed by the Ministry. The Grand *Mufti* plays the role of reporter. The task of the commission is to give the point of view of Islam to the submitted questions.¹

b) In Syria

We find here an institution inserted within the framework of the Ministry of *waqf*. The organization of *fatwa* is directed by the Grand *Mufti* and supervised by a council of seven people among whom there is the Grand *Mufti*, the most highly placed *Mufti* of Damascus and the First Judge of the religious tribunals. The *fatwa* organization is responsible, besides the issuing of *fatwas*, for religious education and for the personnel of the cult. It gives its verdict on works contrary to Islam as well as on the editions of the Koran imported into Syria. The conversion of foreigners to Islam is done before this organization; a certificate is given to the convert to this effect.

The Grand *Mufti* is appointed by the President of the Republic, chosen from among three names presented by the Ministry of *waqf*. We point out here that the Grand *Mufti* of Syria, Ahmad Kuftaro (d. 2004), occupied the post since 1964.

Muftis with a university degree are appointed in every region and district. They are expected to send copies of their *fatwas* to the *fatwa* organization monthly.

When there is no solution to a question among the four Sunnite schools, the competence over the *fatwa* lies with the above-mentioned council of seven, which chooses two other distinguished scholars to settle the argument.

The above presented Syrian system concerns Muslims of Sunnite allegiance, who are the majority of the population. The law says nothing about the Shi'ites. The Grand *Mufti* of Syria confirmed to us that the Shi'ites of Syria have their own *muftis*.²

c) In Egypt

Dar al-ifta' al-masriyyah (Egyptian house of *fatwa*) is presided over by a *mufti* appointed by the government. The first written trace concerning the organization dates back to 1895 with the appointment of the first *mufti* and the opening of the

¹ The role of the *Mufti* in Jordan is governed particularly in law no. 142 of 1966 and ruling no 23 of 1979. Nothing has been said about the modalities of the appointment of the *Mufti* in general.

² For Syria, see in particular law no. 185 of 1961.

register of the *fatwas*. The *mufti*, before the 1952 revolution, was given the title of *mufti al-diyar al-masriyyah* (the *mufti* of the regions of Egypt). Later, he came to be designated as *mufti al-jumhuriyyah* (the *Mufti* of the Republic).

The organization is comprised of the Bureau of the *Mufti* of the Republic, four delegates of the tribunals having the rank of judges and three delegates of the procurer having the rank of substitutes, all of them graduates of the Faculty of Islamic law of Al-Azhar. The bureau carries out research and helps the *Mufti* of the Republic to answer the questions addressed to him. It also chooses the *fatwas* that must be published.¹

Work experiences of two years for *muftis* are provided to judges of Asian Muslim countries wishing to later practice the function of *mufti*.

Besides this official organization which depends on the State, there exists an organization of *fatwa* within the framework of Al-Azhar. We attended in April 1990 a session of *fatwa*. The *mufti* welcomed visitors without any restriction in a hall open to all. One after the other, people with questions sat in front of a *mufti* in a clerical frock and asked him for a solution to their problems. The public could hear the question and the response. We noted the presence of an Italian woman among the visitors; she had come to ask for a *fatwa*.

Thus, it can be noted that the responsibility of issuing the *fatwas* is concentrated in the hands of two organizations, both of them official. The State's determination to forbid freelance exercise of the function is evident in the two laws of 1971 and 1973. The prohibition, however, seems to concern only the tribunals which are obliged to address themselves to the State organization of the *fatwa*. The public itself remains free to have recourse to any other *mufti*, as private individuals.²

To conclude, let us point out that Arab countries have an organization composed of lay people responsible for the writing and interpretation of the laws. They sometimes carry the name of organization of *fatwa* and legislation, leading to confusion with the *fatwa* organization of which was the question above. But, in principle, the organization does not take care of the question of conformity with Islamic law, a task reserved to the "religious" organization of the *fatwa*.

4) Influence of *muftis* on non-Muslim countries

A) *Muftis in non-Muslim countries*

In the West, Muslim centres issue *fatwas* for those who ask for them. That is the case for the Muslim cultural foundation of Geneva which we contacted.

The foundation receives on a daily basis questions of Muslims in every domain. The *imam* in charge of the foundation issues *fatwas* in response to the questions asked. However, he often consults the *fatwas* that have already been issued else-

¹ *Fatwas of Dar al-ifta' al-masriyyah* can be found on the Internet in Arabic: <http://www.elazhar.com/Ftawa/Default.asp>.

² For more information on this institution, see: *Al-fatawa al-islamiyyah*, vol. 10, 1983, 3650-3667. This organism has been publishing its most important *fatwas* since 1895. Some *muftis* are very prolific. For instance, Hasan Ma'mun issued, between 1955 and 1960, 11992 *fatwas* (*Ibid.*, vol. I, pp. 34-35).

where. It also happens that he addresses himself to other religious personalities to ask them for their advice or opinion.

The *imam* responds free of charge to the questions he is asked. Every person is authorized to ask questions, in writing or orally. The response also can be written or oral. He keeps a copy of the *fatwas* issued, but they are not published. Sometimes Swiss tribunals address themselves to him to get a Muslim point of view in a trial. It also happens that consulates ask a person to provide them with the confirmation of the *imam* in a particular domain.

B) Recourse to muftis in Muslim countries

Muslims living in the West address themselves to the *muftis* in Muslim countries. Some reports mention this. We cite a very significant case extracted from the book of Al-Qaradawi to whom a Muslim living in a socialist country asks a question concerning bank interests and insurances of the goods.¹

In a long response, Al-Qaradawi says that Muslims must abandon capitalist banks and create their own banks based on principles that respect Islamic law. As long as Muslim banks do not exist, the individual must maintain in himself the sentiment of dissatisfaction, until when, together with the others, he will succeed in correcting the situation. Without this sentiment of dissatisfaction, no change is possible. He must continue to feel guilty, that signifies that he continues to distinguish what is right from what is not. Concerning insurance of goods: it can be accepted, even if, according to Islam, it is usury-tainted like all the current insurances. One should not, however, accept life insurance which diverges from all forms of Muslim contracts and is not at all necessary. As for bank loans, they are absolutely forbidden and can only be allowed in case of necessity, as in the case of the procurement of food or clothes for the children or the needs for the sick. If, on the contrary, the recourse to such financial operations forbidden by Islam is the condition for developing one's own business, it would be better to accept to live with little than accepting such operations.

It also happens that Western countries ask Muslims living among them to present a *fatwa* of renowned religious authority from a Muslim country. Thus, the Muslims living in Brussels asked to have their own cemetery and the Belgian government requested for a *fatwa* to justify their demand, a *fatwa* was obtained from the Saudi *Fatwa* Commission. It stated:

The Muslim dead must be buried in an independent cemetery reserved for them, and it is not allowed to bury them in a non-Muslim cemetery. Imam Al-Shirazi (d. 1083) says in *Al-Muhadhdhab*: "The disbeliever shall not be buried in the cemetery of Muslims and the Muslim shall not be buried in the cemetery of disbelievers." Al-Nawawi (d. 1277) says in *Al-Majmu'*: "Our companions are of the unanimous opinion that Muslims shall not be buried in the cemetery of disbelievers, and the disbeliever shall not be buried in the cemetery of a Muslim."

¹ Al-Qaradawi: *Min huda al-islam*, p. 614-624.

From here follows the obligation to dedicate to Muslims a place of burial in a cemetery that is reserved for them.¹

C) *The extra-territorial effect of fatwas*

It happens that *fatwas* issued in a Muslim country be of general application. The best known case in the West is the *fatwa* of Khomeini (d. 1989) dated February 13, 1989 condemning Salman Rushdie to death. The following is the translation of the *fatwa*:

I am informing all brave Muslims of the world that the author of *The Satanic Verses*, a text written, edited, and published against Islam, the Prophet of Islam, and the Qur'an, along with all the editors and publishers aware of its contents, are condemned to death. I call on all valiant Muslims wherever they may be in the world to kill them without delay, so that no one will dare insult the sacred beliefs of Muslims henceforth. And whoever is killed in this cause will be a martyr, Allah willing. Meanwhile if someone has access to the author of the book but is incapable of carrying out the execution, he should inform the people so that [Rushdie] is punished for his actions.²

The *fatwa*, coming from the Supreme Guide of the Iranian revolution, has a binding character. No turning back is allowed, except for the concrete repenting of Salman Rushdie leading to the withdrawal of his work from circulation and the retrocession of the gains realized by the selling of the book.

V. Consensus (*ijma'*)

1) Definition of consensus

The verb *jama'a* (to reunite or to consult) from which is derived the term *ijma'* (consensus, unanimous agreement) recurs in many verses, of which we cite the following two:

Recite to them the news of Noah, when he said to his people: "O my people! If my stand and my reminding of God's signs is grievous to you, then I confide in God. So devise your affair, you and your associates and let not your affair be dubious unto you. Then decide upon me and do not respite me (51/10:71).

When they went away with him, and conferred to put him down into the bottom of the pit, we revealed to him: "You will inform them of this their affair, while they do not perceive" (53/12:15).

Consensus (*ijma'*) is generally considered the fourth source of law, after the Koran, the *Sunnah* and analogy. We classify it in the category of collective *ijtihad*, as did also Hasab-Allah.³

¹ *Fatawa al-lajnah al-da'imah*, vol. 9, p. 6.

² http://en.wikipedia.org/wiki/The_Satanic_Verses_controversy#cite_note-22.

³ For more information concerning consensus, see in particular Mansour: *L'autorité dans la pensée musulmane*; Bernard: *L'accord unanime de la communauté*; Abu-Jayb: *Mawsu'at al-ijma' fil-fiqh al-islami*; Abu-Sa'd: *Al-ijma' 'ind a'immat al-sunnah al-arba'ah*; Muhammad: *Al-ijma'*; Ahmad: *Al-Ijma'*; Al-Shuwayki: *Al-ijma'*; Al-Jassas: *Al-ijma'*; Ibn-al-Mundhir: *Al-ijma'*.

2) Legitimacy of having recourse to consensus

Jurists ask themselves whether it is legitimate to have recourse to consensus, on account of the fact that the Koran and the *Sunnah* are supposed to have resolved all the problems and that the legislative authority belongs not to men but to God alone through his prophets. The majority, however, pronounced themselves in favour of consensus, but without necessarily agreeing about the conditions of its realization.

A) *The majority in favour of the consensus*

The greater majority of jurists give a binding force to consensus. They base themselves on the Koran, the *Sunnah* and reason.

Some verses of the Koran consider that God established the Muslim community as a witnessing community (and therefore truthful) which orders the good and forbids the bad (and therefore infallible); they encourage the community not to be divided and to submit itself to the authority:

Thus we have made you a median nation so that you be witnesses over the humans, and that the messenger be witness over you (87/2:143).

You were the best nation brought forth unto humans. You order the appropriate, forbid the detestable and believe in God (89/3:110).

Whoever is in dissension with the messenger after the guidance became manifest to him, and follows a way other than that of the believers, we will turn the back on him as he turned the back, and will roast him in gehenna. How evil is the destination! (92/4:115).

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day. That is better and a better interpretation (92/4:59).

When an affair, whether of security or fear, comes to them, they spread it. If they returned it to the messenger and those charged with authority among you, those among them who are able to think out the matter would have known it (92/4:83).

To be noted here is the interpretation given to the verse 92/4:59: should there be a disputation about a matter, they should have recourse to the Koran and the *Sunnah*; but should any dispute emerge, then the agreement of the believers should be considered the norm to be followed.

Besides the above-mentioned verses, the partisans of the recourse to consensus forward hadiths of Muhammad which encourage not to be divided and accord infallibility to the will of the community:

He who rejoices in the comfort of paradise let him remain with the group.

He who distances himself from the group a span he has dissociated himself from Islam.

My nation will never agree on an error.

Certainly, God does not allow that my community be unanimously favourable to a heresy.

What Muslims consider good, God considers it good.

Jurists add a rationalist argument: it is impossible that the jurists agree during a given era on a point without the point having any basis in the Koran or the *Sunnah*. Similarly, it is impossible that they all make an error without anyone of them realizing it. Consequently, their consensus certainly has a basis in the Koran and the *Sunnah*, a fact that renders obligatory the submission to their consensus.

B) Opponents of consensus

Those opposed to the binding force of consensus say that verse 92/4:115 which demands to follow the path of the believers does not refer to the consensus. Following the path of the believers here signifies imitating the believers in their obedience to the Koran and the *Sunnah*. The verse in favour of consensus was only cited at the time of Al-Shafi'i (d. 820). On the other hand, verse 92/4:59 which demands obeying "those in charge among you" refers here to those who exercise State authority, and not to consensus. Relying on consensus in accordance with this verse could signify not addressing oneself to the Koran and the *Sunnah*. If this verse and others can give some kind of basis, they cannot, on the other hand, provide certitude.

As for the hadiths attributed to Muhammad, they are unique hadiths¹ which are not binding in a compelling manner. The call for attachment to the group is a warning against the division of the nation when faced with an enemy or a tribulation. And the hadith according which "my nation will never agree on error" should be interpreted as signifying that in every era there will be a person who will come and denounce error. It can also be pointed out that some hadiths of Muhammad affirm, on the contrary, that the Muslim community can be mistaken. One of such hadiths says: "The last hour will only come for the wicked within my community." He also said: "God does not make science disappear by removing it from among his scholars, but by making the scholars disappear. And when there will no longer be a single scholar, people will turn to ignorant leaders to whom they will address their questions and who will respond through *fatwas* without being knowledgeable. Hence they will go astray and lead others astray."

As for the rational argument, it does not hold up, for it presupposes the existence of a consensus, which is not the case. On the other hand, supposing it exists, it must have its basis in the Koran and the *Sunnah*. The norm that flows from it, in that case, would be based on the two sources. And supposing that consensus is admissible, it will be the result of the effort of reasoning (*ijtihad*), and by consequence it is only binding for the one who exerts the effort.

The opponents also evoke the inherent difficulty of determining those who are called upon to establish the consensus, a question over which there has been no unanimity. And even if it were possible to determine them, it would be practically impossible to unite all the *mujtahids*. Something that has never happened.

¹ For information about this concept, see Part II, chapter II.I.4.D.

3) Protagonists of consensus

As the Koran and the *Sunnah* did not establish consensus, the jurists have strongly diverged about the conditions which must be fulfilled in order for there to be consensus. The first problem is to know who is called to participate in consensus.

The cited texts of the Koran and of the *Sunnah* speak rather of the community and at times of those with authority. We can therefore deduce that consensus signifies the unanimous agreement of the Muslim community, a bit in the sense of direct democracy. But Malik (d. 795) considers that only the consensus of the people of Medina is convincing, arguing that they know religion better by the fact that Muhammad lived among them. Hadiths of Muhammad are cited in this regard in favour of the town, one of which is the following: "Medina is good and separates what is malicious like the fire separates the impurities from iron." Others consider that it is a question of the consensus of the four first Caliphs (known as Rightly Guided Caliphs) alone, in virtue of a hadith of Muhammad which says: "Follow my *Sunnah* and the *Sunnah* of the Rightly Guided Caliphs after me and firmly hold on to them with the back teeth (molars)." Dhahirites limit consensus to the companions of the prophet alone, considering that the verse "You were the best nation brought forth unto humans. You order according to usage, forbid the detestable and believe in God" (89/3:110) is formulated in the present, the period during which Muhammad lived and not for future generations. As for the Shi'ites, they consider that the only consensus to be taken into account is the one ensuing from the four members of the family of Muhammad, namely Fatimah, her husband 'Ali (d. 661) and their two sons Al-Hasan and Al-Husayn. They cite in this regard the following verse which we present in its totality:

Stay in your houses. Do not bedizen yourselves as the bedizenment of [the epoch of] the first ignorance. Perform the prayer, give the purificating [alms] and obey God and his messenger. God wants to remove the abomination from you, people of the house [of the Prophet], and to purify you fully (90/33:33).

At the time of the revelation of this verse, Muhammad may have covered four people with his cloak while saying that they are People of his house. Although the verse establishes obligations of decency and reservation with regard to women, Shi'ites consider that it guarantees the infallibility of the People of the House of the Prophet, fallibility being considered contamination.

The divergences in opinion concerning consensus demonstrate in fact an evolution in the concept of consensus itself which, for the majority of Sunni jurists, has become an explicit consensus, and not a tacit one, of those who possess authority, and more specifically religious scholars, as competent people in religious matters, excluding from this circle the common run of the people, dissidents and non-Muslims. Al-Ghazali (d. 1111), however, widens the circle, considering that some religious topics are known by all, such as the necessity to perform the five prayers, pilgrimage and fasting. In such fields we can speak of the unanimity of the community. Other topics, on the contrary, require profound knowledge, and in that case only the opinion of the experts in the topic is taken into consideration. As for the

non-experts, they are bound to follow the opinion of the experts who are their representatives. We are therefore dealing with unanimity, but indirectly.

4) Domain of consensus

Consensus as a source of law aims at establishing religious norms. By consequence, consensus, in the strict sense of the term, must be concerned with the religious aspect. Nonetheless, those responsible for establishing norms are not totally free. Their consensus can concern questions which have already been resolved in a clear manner by the Koran and the *Sunnah*. Their role is therefore auxiliary. Even there, consensus should be based on the two basic sources. It cannot be the result of simple rational speculation. It is therefore necessary to find its link, however little that may be, to the Koran and the *Sunnah*.

Jurists consider that consensus can concern profane matters. In that case, it is people in possession of authority in the matter at hand who should deliver judgment. That is the case with decisions of a scientific or political nature.

That, however, poses a problem in what concerns the determination of what is religious and what is not, the separation between law and religion being practically impossible. The problem is posed even beyond juridical norms, as was the case in the affair of Galileo (d. 1642) in the context of the Catholic Church. We cite here a case we have worked a lot on: female circumcision. Should it be examined from the angle of religious norms or from that of medicine? If examined from a religious angle, we would be limited to asking whether or not the practice is prescribed by the Koran and the *Sunnah*, and in case it is, we should carry it out independently, neglecting the opinions of the medical doctors. If on the contrary, we examine it from the medical angle, we should ask ourselves if the practice is useful or, on the contrary, harmful and therefore allow it or forbid it in the light of the result of the examination and we should not take into account the existence or the non-existence of any religious norm. In the first case we would request the consensus of religious scholars and in the second we would look for the consensus of doctors.

5) Relevance of consensus in time and space

Consensus is supposed to be established by the jurists living during the same era and not by all the jurists of all times. Otherwise we would have to wait till the end of time to know what is unanimously agreed upon. On the other hand, consensus was to be reached after the death of Muhammad, he being the reference in case of conflict.

When contemporary jurists give an opinion on a particular case in a unanimous manner, it is considered that their opinion acquires validity for all times. If the resolved case is presented to the jurists of the following era, they must adopt the judgment given by their predecessors and abstain from all new effort of reflection on the same case. Hence, a religious law resulting from a consensus is definitive, indisputable and can neither be contradicted nor abrogated. The universal validity of a norm obtained by consensus does not apply to norms obtained through the effort of an individual or a group of individuals (*ijtihad*).

A given generation can diverge over a norm and the subsequent generation may agree unanimously over such a norm, but the contrary is not possible. Thus, if one generation has adopted a norm unanimously, it is not possible that a subsequent generation decides unanimously contrary to what had been settled by the previous generation.

If two divergent opinions have been expressed, jurists consider that only those two opinions should be authorized and no one should later come up with a third opinion.

6) Possibility of reaching consensus

Muslims jurists have talked a lot about consensus, showing a lot of ingenuity. Every work dedicated to the foundation of law had to speak about it. But the conditions established for its realization make it practically impossible in reality. It is a question therefore of an intellectual debate without any real effect. We do not know any situation where all Muslim jurists were assembled to give their opinion on a particular question. Muslims do not know the concept of council, in force in the Catholic Church, a term which Savvas, a Christian author, uses when talking about consensus at the end of the 19th century when writing to Westerners.¹ What we know, on the contrary, are situations where political authorities have had recourse to limited meetings of jurists whose opinion was endorsed by the authorities themselves. In this regard, it is reported of Ibn-Hanbal (d. 855) as having said: "He who pretends that there had been consensus lies... It is better to say: to my knowledge, there has never been any conflict of opinion on this question." And it is in this sense that the norms assembled in the collections abusively entitled unanimous norms should be understood. To be cited among such norms is the nomination of Abu-Bakr (d. 634) as Caliph, the prohibition of the consumption of the fats of pork, the granting of a sixth of the heritage to the grandmother of the deceased, the depriving of the grandchildren of the heritage of their grandfather, where their father is outlived by the latter, etc.

While affirming that consensus, in the true sense of the term, never existed, Khallaf considers that it is possible to reach such a consensus if each Muslim country designated specialists and that the opinion of each of these specialists on a given question was communicated to everybody.² Muslim jurists remain therefore attached to such an institution, be it in order to find a proper role or to denigrate the right to legislate for other organs of society such as the parliament, it being composed of representatives without religious knowledge and at times non-Muslims. But Muslim States themselves do not have the interest to create such a parallel organism which would monopolize the legislative competence and would delegitimize the decisions of the State.

In spite of the absence of any mechanism to make consensus work, Muslim religious scholars play an important role on the decisional level. Nowadays, no Muslim State can afford to do without their opinions. Be it for the visit of Sadat to Jerusalem, the stationing of foreign armed forces on Muslim soil during the war against

¹ Savvas, part I, chapter I, p. 37.

² Hallaf: *Les fondements*, p. 73-74.

Iraq, the launching of a banking system, or the abolition of female circumcision, the State seeks Muslim legitimacy of its acts. It has in this regard State organs (such as the *Mufti* of the Republic of Egypt) or a supra-State organ (such as the Islamic Academies of *fiqh*), organs which are often flexible enough to satisfy the authorities and not to be discredited with regard to the public).¹

Chapter VIII.

Tools of rational effort (*ijtihad*)

A *mujtahid* faced with a problem and does not dispose of explicit norms from the Koran and the *Sunnah* must exert intellectual effort in the establishment of such a norm. He thus makes use of several tools some of which we discuss in this chapter. The most important of them is analogy.

I. Analogy (*qiyas*)

1) Definition of analogy

The term *qiyas* (analogy) signifies estimation or appreciation of the value of a word, an action or a thing, through human reasoning.

On the juridical level, analogy is defined as follows: searching, in the question to be resolved, for the existence of the reason that motivated in the past the application of the legal quality to a question duly resolved. It makes use of the faculty of reason to establish the analogy (legal similitude) between the previously resolved question and the one for which a solution has been requested in order to legally qualify the latter by applying to it, through analogy, the quality the law had admitted as guaranteeing the legal character of the former.

We are faced with a previous solution which serves as the base (*asliyyah*) and a solution that is being sort out by analogy (*qiyasiyyah*). Classic works of Al-Suyuti (d. 1505) and Ibn-Nujaym (d. 1563) deal with analogy under the title *Al-ashbah wal-nadha'ir* (similarities and similars). Let us take some examples from the Koran and the *Sunnah*.

The Koran forbids wine produced from grapes:

O you who believed! Wine, gambling, erected stones and [divinatory] arrows are only abomination, work of Satan. Avoid them. Maybe you succeed! (112/5:90).

We are faced with a norm that forbids wine produced from grapes. The prohibition is due to the fact that wine provokes intoxication. In accordance with this norm, jurists have forbidden any other fermented drink extracted from other substances such as barley, dates, etc., as well as drugs. We can distinguish, in this respect, five elements:

- The main question (*asl*) which serves as the measure: the wine made from grapes of which the Koran speaks.

¹ See Part I, chapter II.VII.4.

- The norm related to the main question (*hukm al-asl*): prohibition of its consumption.
- The reason behind the norm (*'illah*): intoxication obtained through the fermentation of grapes.
- The measure question (*fir'*): every drink leading to intoxication after fermentation.
- Application by analogy to the examined question the same norm applied to the main question: prohibition of the consumption of every drink leading to intoxication after fermentation.

The Koran forbids commerce during the time of prayer:

O you who believed! When the call is made for prayer on Friday, hasten to God's remembrance and leave off the sale. That is better for you. If you were knowing! (110/62:9).

It is believed that the prohibition is motivated by the fact that commerce prevents one from accomplishing the religious duty. In accordance with this verse jurists forbid every other activity during prayer like sports for example.

Muhammad said: "There is no succession for the assassin." This means that he who attempts on the life of the defunct cannot inherit from him. Jurists have considered that the heir may have assassinated the defunct in order to be able to seize his property. They have extended the rule to the beneficiary of a legacy who assassinates the defunct because his gesture has the same objective.

Muhammad had challenged the testimony of an apprentice blacksmith who had come to give witness in favour of his master. The reason for the challenge: the testimony was profitable to the apprentice and therefore it was suspect. Based on this main question, jurists challenge the testimony of the son in favour of his father and the heirs in favour of the dead. Such a testimony could be profitable to them and renders them suspicious witnesses.

2) Legitimacy of recourse to analogy

A) Arguments of the partisans

Those in favour of the recourse to analogy advance the same arguments as those raised in favour of *ijtihad*. They also add arguments based on the Koran, the *Sun-nah* and reason.

a) Arguments drawn from the Koran

The Koran encourages learning lessons from what happened to the other nations:

It is he who ousted those who disbelieved among the people of the book from their homes, at the time of the first gathering. You did not presume that they would leave, and they presumed that their fortresses will protect them from God. But God came to them from whence they did not think, and threw terror in their hearts. They demolished their houses with their own hands and the hands of the believers. Therefore take a lesson, o endowed with insight! (101/59:2).

Have they not travelled on the earth to see how the end of those before them was? They were more numerous than them, stronger in power and in the traces

[they left] on the earth. Yet what they were earning did not avail them (60/40:82).

Yet, argue the adepts of the recourse to analogy, the encouragement to learn from the previous nations would be futile if no analogy is established between our situation and the situation of those nations. They add that the Koran itself does have recourse to analogy:

Does the human think that he will be left neglected? Was he not a drop of sperm ejaculated? Then he was an adhesion. Then God created and shaped. Then he made the couples of him: the male and the female. Is not that capability to give life to the dead? (31/75:36-40).

Those who were charged with the Torah but did not take it in charge are similar to the donkey which is charged with some books. What an awful resemblance of the people who belied God's signs! God does not guide the oppressive people (110/62:5).

Yet, if analogy is used by God, his creatures cannot be deprived of it if they are to know his norms. Besides, the Koran is the basis of the norms it establishes:

Say: "In what was revealed to me, I do not find forbidden, on an eater that he eats, except carrion, flowing blood, pig's meat - for it is an abomination - or what is sacrificed, by perversity, to other than God" (55/6:145).

O you who believed! Wine, gambling, erected stones and [divinatory] arrows are only abomination, work of Satan. Avoid them. Maybe you succeed! (112/5:90).

They ask you about menstruation. Say: "It is harmful. So retire yourselves from the women during the menstruation, and do not approach them until they are purified. When they are purified, then you may approach them from where God has commanded you. God loves the repentant, and he likes the purified" (87/2:222).

They disobeyed the messenger of their Lord. So he seized them with an increasing seizing (78/69:10).

God will raise those of you who believed and those who were given the knowledge in degrees (105/58:11).

In the first three verses, the prohibition is based on the fact that it concerns impurity, abomination and harm. The two last verses link punishment to disobedience and elevation to faith and knowledge. There is a link between norms and causes, which implies that where there is a similar cause the same norm should be applied by analogy.

b) Arguments drawn from the *Sunnah*

Mu'adh Ibn-Jabal (d. 639) answered to Muhammad when he was appointed governor in Yemen: "I will judge by exerting effort to resolve questions in conformity with examples contained in the Book of God and the conduct of his messenger, by adapting them to my own judgment and the testimony of my heart." Muhammad

exclaimed: "Glory be to God, who has placed the messenger of his messenger on the right track."

Muhammad had recourse to analogy. For instance, a woman came to ask him if she could do the pilgrimage on behalf of her mother who had died without having accomplished the duty. Muhammad answered her affirmatively by the analogy of the payment of the debt of the mother by the daughter if the mother had not done it while she was alive. In another case, a Bedouin consulted Muhammad concerning his wife who had given birth to a black baby and which he did not want to acknowledge as his own. Muhammad asked him, what was the colour of his camels? The Bedouin answered him: "Red." Muhammad asked if among the offsprings of his camels there were none that were brown. The Bedouin responded: "Yes." Muhammad asked: "Where do they come from?" The Bedouin answered: "That is probably hereditary." Muhammad then indicated to him that the colour of his child could also be hereditary.

The adepts of the recourse to analogy cite also the *Sunnah* of the companions of Muhammad who had also made use of analogy. Muhammad never disapproved of such recourse by his companions and the latter never refuted the cases of reasoning by analogy undertaken by some among them.

c) Rational arguments

Jurists say that Islam adapts to every time and to every place. Yet, this is only true if we can have recourse to analogy in order to apply norms established in the past to changing situations. And it is in the nature of reason to make a comparison between similar elements, as does the Koran:

The warnings came to the people of Pharaoh. They belied all our signs. Then we took them with the taking of a mighty, powerful. Are your disbelievers better than those? Or have you an immunity in the scriptures? (37/54:41-43).

Do those who commit the misdeeds think that we will make them, in their life and their death, equal with those who believed and did good deeds? How ill they judge! (65/45:21).

They also consider that without recourse to analogy we can reach absurd conclusions. Thus, human urine would be impure because there is a text that says so, whereas that of the pig would not be impure because there is no text. Wine would be prohibited because of the text, whereas liquors would be allowed due to lack of a text, etc.

B) Arguments of the opponents

Opponents use the same arguments as those raised against *ijtihad*. They add that analogy is a means for speculative proof (*dalil dhanni*): they suppose that wine produced from grapes was forbidden because of intoxication and, based on this supposition, they apply the norm to another product that causes intoxication. They therefore establish norms based on simple suppositions and speculations which are not always as evident as one may think. Yet, according to the opponents, it is not allowed to establish norms and to encumber human beings with obligations based on suppositions. They cite in this regard the Koran which says:

Those who do not believe in the last [life] name the angels with female names. They have no knowledge thereof. They only follow the presumption. However, the presumption avails nothing against the truth (23/53:27-28).

Do not follow that whereof you have no knowledge. The hearing, the sight and the heart: all of these will be asked about (50/17:36).

They also cite a narration of Muhammad which says: "Speculative opinion is the most untruthful word."

The partisans of the recourse to analogy retort that the prohibition of the recourse to speculative opinion of which the two above-mentioned verses speak concern dogmatic matters alone. As for the hadith of Muhammad, it forbids to suspect people and to mistreat them, as explained by the Koran:

O you who believe, you shall avoid any suspicion, for even a little bit of suspicion is sinful (106/49:12).

The verse, according to the jurists, is subtle. It neither says that one should avoid every form of speculation nor that every speculation is sin. They add that speculative opinion is used even in the Koran:

If he repudiates her, she is not permitted to him until she marries another husband. If then he repudiates her, there is no blame on them if they return to one another, if they presume to conform to God's bounds. Those are God's bounds that he manifests to the people who know (87/2:230).

Similarly, if one is not sure of the direction of Makka, prayer is still valid when performed in the direction one thinks to be the correct direction.

3) Conditions for recourse to analogy

If the majority of Muslim jurists allow the possibility of recourse to analogy, they do not apply lesser restrictions to such a recourse in order to avoid any abuse:

- The main question (be it a Koranic text or a hadith of Muhammad) which serves as the common basis for the comparison is neither limited to a particular case nor ungeneralizable. Hence, Muhammad said: "The testimony of Hudhayfah alone is sufficient in the court of justice." The decision of Muhammad concerns only the personality in question. It cannot be extended to other situations by accepting the testimony of an individual in a case, even if the person is advantageously qualified to testify. The decision of Muhammad in a particular case is an exception made with regard to a general rule mentioned in the Koran which prescribes: "O you who believed! when death is present to any of you, [require] the testimony, at the time of bequest, of two equitable among you" (112/5:106).
- The reasons behind the principle question must be clear. Thus, the sale was considered licit by the Koran because it was a question of a contract and the Koran prescribes respect for agreements between different parties: "Fulfil the covenant. The covenant will be asked about" (50/17:34). Subsequently, jurists have had to pronounce themselves on renting. By analogy with sale, they decided that renting is licit because it is also a contract. Similarly, the payment of charity responded to the need to enrich the treasury of the State in view of the

smooth running of public affairs. By analogy, other taxes which have the same objective are considered licit.

- There must be similarity between the principle question and the question to be resolved in what concerns their practical consequences. Thus, wine produced from grapes (forbidden by the Koran) and wine produced from other fruits both produce some kinds of intoxication, hence the extension of the Koranic prohibition to all the drinks that provoke intoxication. They do not take into account here the fact that intoxication is different in intensity depending on the products used (beer is less intoxicating than grape wine) and the person who drinks (some can be more resistant than others), these elements being considered contingent and of little importance.
- The question to be resolved must not be qualified by a direct legal proof, for it is not reasonable to abandon a qualification which can be established by an assertive proof in view of another which is obtainable through analogy. Thus, consent is foreseen for the conclusion of a marriage. We cannot by analogy demand the consent for the dissolution of the marriage by repudiation, this being a right exclusively reserved to the husband by the Koran and by a hadith of Muhammad which says: "Repudiation belongs to he who grabs by the leg." Similarly, one cannot claim that the boy and the girl are both children of the deceased and give them the legal right of succession since the Koran itself has prescribed to give the boy the double of the share of the girl: "God enjoins you concerning your children: The male shall have the equal of the share of two females (92/4:11). Similarly, one cannot call upon the prohibition of killing mentioned in the Koran in order not to make wars that provoke the death of the other, war being prescribed by the Koran: "O you who believed! When you meet those who disbelieved marching, do not turn the back to them (88/8:15).

4) Types of analogy

Analogy can be *a fortiori*, *a pari* or *a contrario*.

A) A *fortiori*

If a juridical norm resolves a situation, but neglects a more serious situation, we can deduce that the law would have all the more so resolved the latter situation. Thus, the Koran forbids the progenies to manifest their irritation against their parent: "do not say "fie" unto them" (50/17:23). All the more so it is forbidden to insult or humiliate them.

B) A *pari*

The legislator, having expressly resolved a hypothesis, sought, it is supposed, to reserve the same approach to a similar other hypothesis. Thus, the Koran says:

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, and do not ever accept their testimony (102/24:4).

The rule applies to those who accuse honest men.

C) *A contrario*

Muslim jurists dwell at length on the possibility of recourse to reason *a contrario*. Without going into too many details, we can say that they do not accept it systematically. Let us take two examples of the refusal to take them into consideration. The Koran says:

Whoever among you has no means to marry believing preserved women, then he may marry of those whom your right hands possess from among your believing maidens (92/4:25).

The verse allows him who cannot marry a free woman to marry a believing slave. But that does not signify *a contrario* that he who can marry a free woman does not have the right to marry a believing slave. And the fact that the verse allows marrying a believing slave does not signify *a contrario* that one cannot marry an unbelieving slave.

The Koran says:

When you speed up on the earth, there is no blame on you to shorten the prayer, if you fear that those who disbelieved will try you. The disbelievers were for you a manifest enemy (92/4:101).

The verse says that a Muslim can shorten the prayer whilst on a journey out of fear of the attack of unbelievers. *A contrario*, should he be travelling during the time of peace, he has no right to shorten it. However, Muhammad allowed the shortening of prayer even during the time of peace, considering that the exemption is a gift granted unto the believers by God.

In other cases, the reasoning *a contrario* is allowed. For instance, the Koran says:

Give to the women their dowries willingly. But if they be pleased to remit you anything, eat it pleasantly and gladly (92/4:4).

A contrario, if the wives do not forgo their dowry in favour of their husbands, the latter cannot have it.

The Koran says:

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, and do not ever accept their testimony. Those are the perverse (102/24:4).

A contrario, if the accuser is capable of presenting four witnesses, he is not to be subjected to 80 lashes and his testimony is to be accepted. On the other hand, as the verse has fixed the penalty at 80 lashes, *a contrario* one can neither give more nor fewer lashes.

Sometimes, the Koran itself enunciates the *a contrario* rule. We give two examples:

They ask you about menstruation. Say: "It is harmful. So retire yourselves from the women during the menstruation, and do not approach them until they are purified. When they are purified, then you may approach them from where God has commanded you. God loves the repentant, and he likes the purified" (87/2:222).

You are forbidden [to take as wives] your mothers, daughters, sisters, paternal and maternal aunts, daughters of brothers and daughters of sisters, your milk-mothers and milk-sisters, your wives' mothers, stepdaughters in your care - those born of women with whom you have consummated marriage, if you have not consummated the marriage, then no blame on you (92/4:23).

These developments indicate that it is necessary each time to analyse the text in order to see whether it allows to take into account or not the *a contrario* reasoning. One has to be sure whether specifications, conditions, quantity or terms mentioned in the text have a restrictive objective and verify that the implicit text does not oppose the explicit meaning of another text.

5) Determination of reason of law and recourse to analogy

What precedes shows that in order to establish the analogy, it is necessary to know the reason underlying the solution provided to the main question. The reason is sometimes clearly stipulated by the Koran. For instance, the Koran exempts a certain number of Muslims from going to war in order to study law: "The believers do not have to mobilize all together. If only a number of every group of them mobilized in order to understand the religion and to warn their people when they return to them!" (113/9:122). But in other cases, the reason is latent and was decided upon by consensus. Thus, the Koran prescribes the guardianship of orphans: "Examine the orphans when they attain the marriage. If you see in them righteousness, hand over their wealth to them. Do not eat them excessively and hastily, before they grow up" (92/4:5). Jurists considered, by consensus, that the reason for the guardianship is minority and the objective aimed at is the protection of the minor. Based on this conclusion, they considered that marriage of a minor, orphan or not, requires the presence of a guardian. We shall come back to this question later when we shall speak about the objectives of Islamic law.¹

II. Unregulated interests (*masalih mursalah*)

1) Definition

Muslim jurists classify interests (*masalih*) into three categories according to their regulation.

There are above all interests worthy of protection (*masalih mu'tabarah*) which the Legislator has resolved. It is the case for the five indispensable interests, namely: the preservation of religion, life, reason, progeny and property.²

There are then the refuted interests (*masalih mulghat*) which the Legislator did not take into account and did not resolve. Muslim jurists give the following examples:

- Muhammad prescribed the emancipation of the slave and, by default, fasting for two months for he who indulges in diurnal sexual relations during the month of Ramadan. No distinction is made between a rich person in possession of a great number of slaves and a poor man. Muhammad imposed two months on the rich in order to dissuade them, but he did not want to take into consideration the interest of dissuasion and preferred the interest of emancipation.

¹ See Part III, chapter III.

² For information on the interests, see Part III, chapter III.III.

- Some could see an interest in excessive religiosity, but this interest had not been taken into consideration by Muhammad who had forbidden monasticism and exaggeration in prayer.
- The Koran accords to the girl half of what it accords to the boy in successional matters (92/4:11). One cannot call upon the principle of equality to accord the girl the same right as that of her brother since the Koran does not take into account this interest.
- The Koran accords to the husband, and only to him, the right to repudiate his wife (87/2:229). One cannot call upon the principle of equality to accord the wife the right to repudiate her husband since the Koran does not take into account this interest.

There is finally the category of interests that have not been resolved neither by the Koran nor by the *Sunnah* or consensus and which can only be deduced from the sources through analogy. The interests are the object neither of approval nor disapproval. They are called *Al-Masalih al-mursalah*, a term we translate by unregulated interests, corresponding approximately to public interest. Some jurists also use the term *istislah* (improvement). The fact that the interests are not regulated requires intervention on the part of the jurists in order to craft norms that govern them.¹ It is a question of leaving a free hand to the discretion of the jurist within the limits foreseen by Islamic law.

2) Legitimization of recourse to unregulated interests

A) Arguments of the opponents

Shi'ites and a number of Sunnite jurists refuse the recourse to the concept of unregulated interests. Having recourse to this concept signifies for them attributing to oneself legislative power, a prerogative reserved only to God. It also implies the accusation that God may have left some aspects of life without regulation. Which is contrary to the Koran which says: "Does the human think that he will be left neglected?" (31/75:36). They also fear that the authorities present their own desires as interests. Thus, they would influence as much the objectives as the means to reach them, evoking the change of time, place, circumstances and opinions. Finally, they consider that recourse to the concept of the unregulated interests attributes to human reasoning a role in the determination of what is good and what is evil, which leads to the elimination of Islamic norms and replacing them with Western norms during the time when a good number of researchers are influenced by Western culture.

¹ Besides the primary works cited in the bibliography, concerning unregulated interests, see 'Abd-al-Rahman: *Al-masalih al-mursalah*; Al-Buti: *Dawabit al-maslahah*; Al-Shinnawi: *Mada al-hajah*; Al-Wa'i: *Al-bid'ah wal-masalih al-mursalah*; Al-Zarqa': *Al-istislah wal-masalih al-mursalah*; Bagby: *Utility in classical islamic law*; Hassan: *Fiqh al-maslahah wa-tatbiqatuh al-mu'asirah*; Hassan: *Jurisprudence of maslaha*; Husayn: *Hijjiyyat al-masalih al-mursalah*; Zayd: *Al-maslahah*.

B) Arguments of the partisans

Partisans of the recourse to the concept of unregulated interest evoke above all the fact that the objective of Islamic law is to safeguard the interests of the believers. They cite to this effect several verses, of which:

God does not want to lay upon you any hardship, but to purify you and perfect his favour on you. Maybe you thank! (112/5:6).

We only sent you as a mercy for the world (73/21:107).

But whoever is compelled by hunger, not inclining willfully to sin, then God is forgiver, very-merciful (112/5:3).

They also cite a hadith of Muhammad: "Injury may not be met by injury."

They add that licit temporary interests change according to times. One cannot therefore limit oneself to what had been regulated at the time of the revelation without infringing on such interests. This is an element of the flexibility of Islamic law which makes of it a law capable of governing at all times and in all places.

On the other hand, we find in the Koran and the *Sunnah* several examples where norms are motivated by interests in the same way that they are, in other cases, motivated by causes. We can therefore act in the same way by relating norms regulating new situations to the interests mentioned in the Koran and the *Sunnah*. Thus, the Koran distributes the spoils of war in order that the riches do not get accumulated in the hands of the rich:

Whatever God allocated as spoils to his messenger from the people of the cities belongs to God, the messenger, the relatives, the orphans, the paupers and the traveller, so that it not be in alternation between the rich among you (101/59:7).

Similarly, the Koran encourages the practice of good so that success may ensue:

Kneel, prostrate, adore your Lord, and do good. Maybe you succeed! (103/22:77).

In the same way, Muhammad forbade to have for wife a woman together with her aunt in order that the family ties do not get damaged.

They add that recourse to the concept of unregulated interests is no other than recourse to analogy in its broader sense. They add that it is not about leaving the door wide open to every form of speculation, as was feared by the opponents, and abuse in itself is not a valuable argument to forbid recourse to the concept. That would signify that we should forbid the usage of weapons simply because they could be used to kill the innocent. And yet, such is not their objective.

They also underline the fact that the companions of Muhammad and some outstanding jurists had recourse to the concept of unregulated interest after his death, by enouncing new norms for new situations. For instance, Abu-Bakr (d. 634) assembled the Koran into a book, a thing Muhammad had not done while he was alive. And the Caliph 'Umar (d. 644) suspended the amputation of the hand of the robber during the year of famine, in spite of the text of the Koran; he fixed the number of lashes against the wine drinker at 80 lashes; he did not apply the deportation of the adulterer in spite of the text of the Koran, because one of the deportees

crossed over to the Byzantine side and became a Christian. Similarly, the companions of Muhammad, after his death, built prisons, minted coins, left conquered lands in the hands of the villagers who used to cultivate them and pay land tax, regulated every other novelty that answered to the needs of the moment and about which sources of Islamic law had been silent.

Let us point out here that it is in accordance with such a concept that Muslim States demand today the putting in writing of marriage contracts and the sale of real-estate, making of the writing a means to prove the marriage and the transfer of property, respectively. Similarly, they allow the separation of two spouses on the basis of ill-treatment.

3) Conditions for recourse to unregulated interests

Having recourse to unregulated interests is very tempting for liberal Muslims looking for arguments to introduce reforms in society. In order to curb this momentum, specialists of the principles of Islamic law have fixed a certain number of conditions for the use of this concept.

- The domain in question must not be regulated by the Islamic law in an exhaustive and exclusive manner, as is the case in the domain of cult. The objective pursued in the latter domain is to please God, and only God can say how one can please him. Thus, it is not possible to change the cult, as does for example the Catholic Church by adopting local languages or by changing religious ceremonies. For Islam, such a change opens the door to sectarianism.
- The interest furthered must be real and not fictitious. The enacted norm must achieve some good and avoid danger or prejudice.
- The interest must be general and not personal. Thus, one cannot formulate a norm to privilege a prince or an influential person to the detriment of the public good.

Specialists of principles of law challenge the reformers' recourse to the concept of unregulated interests in the following cases:

- God allowed certain categories of people, under certain conditions, not to fast during Ramadan in order to avoid danger. One cannot thereof deduce that Ramadan must be suppressed purely and simply for all the workers under the pretext that the nation needs more productivity.
- God encourages Muslims to marry in order to multiply their progeny and in order to prepare themselves to face the enemy. The safeguard of the progeny is considered to be one of the five necessities protected by Islamic law. It is certainly allowed that some families could have recourse to contraception in order to save the life of the mother or in order not to harm the health of the previous child. This, however, must remain exceptional. On the other hand, it is not allowed to embark on general politics of birth-control.
- God demands the covering of nudity and yet he allowed the sick to be naked in front of a doctor in order to be treated. It is not, on the contrary, allowed to extend such an exception to the beaches or theatres under the pretext of conforming to social evolution.

- God forbids the consumption of alcohol, except in case of necessity (sickness) or constraint. On the other hand, it is not allowed to generalize the consumption of alcohol under the pretext of social evolution.
- Islam has established the principle of private property. The safeguard of goods is one of the five necessities protected by Islamic law. For this reason, punishments are foreseen against any infringement of this right. Islam has allowed limiting this right, against equitable compensation and within a strict framework of general interest: the expansion of a mosque, construction of a road, etc. One cannot, on the contrary, confiscate the goods of others in the name of socialism, even if they were unbelievers (*kafirs*).
- Islam has established the right of heritage. It is not allowed to deprive the heirs of the right in order to distribute it to others.
- One cannot, in accordance with the principle of equality between men and women, give to the latter an equal part of succession, the right to repudiate the husband, the right to marry several men or, on the contrary, to refuse the husband the right to marry several wives, to repudiate his wife and to take her back after the revocable repudiation.

According to these specialists, one has no right, in such cases, to evoke evolution in order to establish norms that are contrary to Islam on the basis of the concept of unregulated interests. If a society behaves in such a manner, it ceases to be Islamic. They cite the following verses:

Therefore judge between them by what God descended and do not follow their desires. Beware of them lest they divert you from some of what God descended on you. If they turn the back, know that God wants to afflict them for a part of their faults. Many humans are perverse. Do they seek the judgment of [the epoch of] the ignorance? Who is better judge than God for convinced people? (112/5:49-50).

But if they do not answer you, know that they only follow their desires. Who is more misguided than who follows his desires without guidance from God? God does not guide the oppressive people (49/28:50).

4) Unregulated interests and admission of Western laws

How far can one go in the crafting of norms not covered by the two basic sources, the Koran and the *Sunnah*? Is it possible to abandon the classic Islamic law and its methodology founded on religious norms and replace it with Western laws founded on human reasoning? Hasab-Allah responds that such an attitude would be contrary to Islam.

Since colonization, he writes, some Muslims have been imitating Westerners up to the point of adopting their laws, leaving aside Islamic law, under the pretext that Western laws are more in conformity with the evolution of society, evoking the practice of 'Umar (644) who changed some laws. Hasab-Allah retorts, Islam is not against the evolution of society and its material progress. But Islam endeavours to make the link between such an evolution and such a progress and religious and moral principles. "Islam contains all the eternal norms which guarantee law and

justice among people [...] and all its laws are just, perfect, for every era and for every place, immutable, because the one who made them for men is the Lord of all who knows what is harmful and what is useful."

For him, human evolution and progress do not require any change or complement within such laws. The concept of evolution is a deception disseminated by the enemies of Islam in the Muslim thought in order to undermine Muslim principles. For that reason, some affirm that "Islamic law is evolutive," whereas in actual fact it draws the exact limits of human evolution.

Hasab-Allah rejects the argument which evokes the dispensation made by 'Umar (d. 644) to the application of certain Koranic verses. 'Umar, he says, did it only because the conditions of applying them had not been fulfilled. He excepted particular cases of the application of a general norm.¹ Should we then return to slavery and abandon the Geneva conventions? We will discuss this question later.

III. Juridical preference (*istihsan*)

1) Definition

Al-istihsan designates a juridical procedure which consists, on the basis of rational reasoning, either in abandoning an evident result of analogical reasoning in favour of a less evident one, but more appropriate for the context, or to make an exception to a general prescription. It is therefore a question of choosing among the different possible solutions the one that is considered to be the most appropriate, even the easiest. It is one way of resolving conflicts between the different norms or to reconcile them.

University courses consider juridical preference as one of the sources of Islamic law. But some jurists see in it the equivalent of analogy, not deserving to be treated as a separate subject, assimilating it to the unregulated interests (*masalih mursalah*) we talked about in the preceding point or considering it as a special norm with regard to the general norm.²

2) Legitimacy of recourse to juridical preference

A) Arguments of the opponents

Shi'ites, Shafi'ites and Dhahirites reject recourse to juridical preference, considering that he who has recourse to it follows his own passions. Yet, such cannot be the foundation of a juridical norm:

We descended to you the book with the truth, confirming what is before it of the book and predominant on it. Therefore judge between them by what God descended and do not follow their desires, far from the truth that came to you. To each of you we made legislation and conduct (112/5:48).

Therefore judge between them by what God descended and do not follow their desires (112/5:49).

¹ Hasab-Allah, p. 188-189.

² Besides the primary works cited in the bibliography, concerning juridical preference, see Al-Farfur: *Nadhariyyat al-istihsan*; Isma'il: *Al-istihsan bayn al-nadhariyyah wal-tatbiq*.

And I do not acquit myself, for the soul commands evil, unless my Lord have mercy. My Lord is forgiver, very-merciful" (53/12:53).

But if they do not answer you, know that they only follow their desires. Who is more misguided than who follows his desires without guidance from God? God does not guide the oppressive people (49/28:50).

As for whoever feared the stand of his Lord and forbade his soul from the desires, the garden will be the shelter (81/79:40).

Having recourse to juridical preference also signifies that God neglected an aspect of life without regulating it, which would be contrary to the affirmation of the Koran:

Today, I perfected for you your religion, and fulfilled my favour upon you (112/5:3).

We did not neglect anything in the book (55/6:38).

Nor anything moist or dry but it is in a manifest book (55/6:59).

We descended on you the book, as manifest [explanation] of everything, (70/16:89).

Does the human think that he will be left neglected? (31/75:36).

They add that many verses of the Koran command Muslims to obey God and his Messenger:

O you who believed! Obey God, and obey the messenger and those charged with authority among you. If you dispute about a thing, so return it to God and the messenger, if you were believing in God and the last day (92/4:59).

And yet, the verse does not say: "If you dispute in any matter, you shall have recourse to juridical preference." On the other hand, Muhammad used to wait for revelation and not to have recourse to juridical preference although he would have done it without being mistaken, as he was inspired.

Finally, they argue that juridical preference is based on reason, a quality common to the learned and the ignorant. Yet, were it allowed to act out of preference, each one would feel free to make a new law for himself. What is true for one would be perceived as false for the other. And this would be source of division, whereas God commands unity:

Do not be as those who separated and diverged, after the proofs came to them. Those will have a great punishment (89/3:105).

Obey God and his messenger. Do not dispute with one another lest you would fail (88/8:46).

"Establish the religion, and be not divided therein" (62/42:13).

Al-Shafi'i (d. 820) is among the sternest opponents of recourse to juridical preference. He considers that "he who makes a preference does the job of the legislator," which is forbidden in Islamic law. He adds that a person can only judge in a truthful manner if he knows the truth, and this can only be known by God, either direct-

ly through the texts, or indirectly, through deduction. Yet, God established the truth through the Koran and the *Sunnah*, and every problem finds its solution therein.

The Dhahirites also reject recourse to juridical preference. For instance, Ibn-Hazm (d. 1064) says truth in religion cannot be the result of the preference of certain people. Truth is true even if people find it ugly, and falsehood is false even if some find it beautiful. Juridical preference is nothing other than following one's own passions and errors. For him therefore only God can decide what is true and what is false.

B) Arguments of the partisans

Other schools, on the contrary, admit recourse to juridical preference. For instance, faced with the different solutions offered to his students, Abu-Hanifah (d. 767) used to conclude saying: *astahsin* (I prefer), thus opting for the one he considered to be the best. Malik (d. 795) used to see in the juridical preference nine tenth of the science of law, placing it above the reasoning by analogy which he mistrusted.

Those who admit recourse to juridical preference base themselves on the presence of the concept in the Koran:

We wrote for him, on the tablets, an exhortation of everything, and an expounding of everything. "Take them with strength and order your people to take the best from them (7:145).

Say to my servants to say what is best (50/17:53).

Who hear the word and follow the best thereof. Those are they whom God guided and those are those endowed with intelligence! (59/39:18).

Follow the best of what was descended to you from your Lord, (59/39:55).

They also evoke a saying of the hadith of Muhammad: "What Muslims consider to be good (*hasan*) is also good for God."

They add that the Koran does not prescribe hardship, in line with the objective of juridical preference:

God wants ease for you, he does not want hardship for you, (87/2:185).

Finally, they argue that some solutions were adopted through consensus in accordance with the principle of juridical preference. Thus, for the sake of convenience, they admit that he who frequents the baths should pay a certain sum of money regardless of the amount of water used and the duration of the time spent therein. Yet, if one reasons by analogy, such a contract should be forbidden due to its uncertain character.

Contemporary jurists endeavour to reconcile the two trends of thought by attributing the divergences to misunderstanding in the definition of the term *istihsan*. Preference of one reasoning against another or of an exceptional law to a general law must not be based on sentiments, but on valid arguments, with respect to the objectives of Islamic law which aim at safeguarding the interests of the people. Yet, there are situations where the application of the resulting judgment of analogy can go against these interests or even become the cause of prejudice. We give some examples of recourse to juridical preference:

Should someone inadvertently eat during the month of Ramadan, his fasting becomes invalid in accordance with the verse:

Eat and drink until the white thread appears to you distinct from the black thread at dawn. Then complete the fasting until the night (87/2:187).

It was preferred, however, not to invalidate the fasting by having recourse to the words of Muhammad which say: "He who eats and drinks inadvertently during the fasting, let him continue with his fasting for it is God who gave him to eat and to drink."

Muhammad said: "He who sells, he must do it with a pre-determined measure, or a pre-determined weight, or a pre-determined delay." This signifies that the merchandise should exist in its definitive form and exposed so that the buyer can examine it before accepting it. Nonetheless, Muhammad rendered licit the sale of certain agricultural or horticultural products which are not yet ripe (the contract of *salam*). Similarly, the sale with up-front payment for art and material products is allowed, products which do not exist as yet, but which must be manufactured by ordering them (contract of *bay' al-istisna'*). In such cases, one solution is preferred to another, both of which are envisaged by the religious sources, considering that that would be more appropriate for the safeguarding of the legitimate interests of the people.

Someone decides to consecrate land to a pious foundation, without indicating in the act of the foundation that the road and water are part of the land. We can compare this foundation either with a sales contract (and in that case, the road and water are not part of the land unless expressly indicated in the contract), or with the contract of farm renting (here the road and water would be part of the land, even without express indication in the contract). Jurists prefer the comparison with the contract of farm renting rather than with that of sales because it is more appropriate, considering that the objective of the foundation is the use made of it and the use is only possible if one can have access to land and water.

A person under guardianship bequeathed his goods to works of beneficence after his death. If one reasons by analogy, one can compare this act to donation. Yet, a person under guardianship has no right to make a donation. It would be considered here that the prohibition of donation during the life-time of the concerned has as objective the protection of the person under guardianship so that he does not become needy and dependent on others. And as the legacy of goods affects ownership only after the death of the person under guardianship, jurists consider that the legacy is valid.

According to Islamic law, the flesh of raptors and carnivores (lions, leopards, wolves, etc.) is forbidden. Consequently, one cannot drink or perform the ablution with the water from which they drunk, as their saliva gets mixed up with water while lapping up. By analogy, one should also abstain from drinking or from performing the ablutions with the water from which carnivorous animals like vultures, crows and eagles drunk. But some jurists consider that the prohibition cannot be extended to these birds because, they say, birds drink with their horn beaks, consequently, their saliva does not get mixed with the water which remains pure.

3) Conditions for recourse to juridical preference

Juridical preference cannot be used without restriction; otherwise it would result into the dismantling of the Muslim juridical system. Muslim jurists consider that a norm deduced through the procedure of juridical preference must fulfil the following conditions:

- It must be admissible when the solution reached at through rational effort seems to be bad.
- It must be based on the sources of Islamic law.
- It must safeguard the interest accepted by Islamic law.
- It must not be in opposition to a clear text of the Koran or the *Sunnah* or what is known as being necessary matters of religion.
- It must not lead to an illicit result.
- It must be established by someone who has the capacity of deducing norms through rational effort (*ijtihad*).

IV. Presumption of continuity (*istishab*)

1) Definition

Etymologically, the term *istishab* signifies accompaniment. For jurists, it indicates the presumption of continuity defined as follows:

The respect that the law recommends to the judges concerning a situation or a quality whose existence was duly recorded, whenever it is not demonstrated that things have undergone modification in their way of being or a deterioration changing their qualities.

A jurist faced with the assessment of a particular situation has recourse to this concept as a last resort, after having exhausted all the other means.

2) Classification of the presumption of continuity

Presumption of continuity can be of different forms:

- Presumption of legality

Every useful thing not forbidden is presumed licit, and every useless thing is illicit. This is deduced from the following verses:

It is he who created for you what is on the earth (87/2:29).

They ask you what is permitted to them. Say: "Are permitted to you the good [things]" (112/5:4).

Say: "Who forbade God's ornament that he made for his servants, as well as the good [things] among [his] provisions?" (7:32).

Thus, it is allowed to eat anything, with the exception of food which is expressly forbidden by a norm. It is considered that if God has put at our disposal a particular thing, it means he has allowed us to make use of it. There is a contradiction between forbidding someone something and putting it at his disposal.

- Presumption of generality

It signifies that every norm is supposed to be of general application, except if there exists a specification.

- Presumption of rational or legal continuity

Thus, the right to a property acquired by a person in accordance with a valid contract can only be withdrawn from him through presentation of tangible proof of its expiry. Similarly, a relationship induced by a marriage contract remains valid until proof is produced invalidating it. He who gets a debt remains liable until there is proof to the contrary. If a person disappears, he is considered alive until proof of his death. Thus, if at the time of the sharing out of a succession, one of the heirs has been absent for a long time, without it being possible to produce proof of his death, the judge must consider him to be alive, for such was his state when he left the country. One should therefore leave aside what at the present moment (at the moment when one is called to make the judgment) is doubtful and accept what does not cause any doubt, that is, the state of health and the former life observed of the absent heir.

Two juridical rules reproduced by the *Majallah* deal with this kind of presumption:

Article 4 – Certainty is not dispelled, (does not dispel cause), by doubt.

Article 5 – It is a fundamental principle that a thing shall remain as it was originally

- Presumption of initial non obligation

A person is presumed innocent or clear of every debt towards others, unless proven guilty or if he contracts another debt. The *Majallah* deals with this kind of presumption in article 8 which says: "Freedom from liability is a fundamental principle." What corresponds to the presumption of innocence. On the cultic level, it can be considered that one should not fast during the month of Sha'ban (8th month of *Hijrah*), as the Koran has indicated that fasting is not prescribed during this month, but only during the month of Ramadan. One cannot ask another person to perform six prayers whereas the Koran has only prescribed five.

V. Drawing lots

1) Legitimacy of recourse to drawing lots

Although gambling is forbidden by the Koran (87/2:219, 112/5:90-91), drawing lots can serve as a source for law.¹

Thus, in the case of the sharing of the goods, in order to know the share that goes to each of the co-owners, having recourse to drawing lots could be envisaged and the drawing creates a right. Two passages of the Koran can be cited here:

Jonah was of the messengers. In that time, he fled to the overloaded felucca. Then he joined the lots and was of the disconcerted (56/37:139-141).

That is from the news of the secret that we reveal you. You were not with them when they threw their pens [to know] who would be the guardian of Mary! Nor were you with them when they disputed one with another (89/3:44).

¹ Besides the primary works cited in the bibliography, concerning drawing lots, see Al-Mazid: *Tahqiq al-sun'ah fi bayan ahkam al-qur'an*.

The first passage refers to the biblical story of Jonas. Sent by God to transmit to Nineveh news about its oncoming destruction because of its wickedness, he escaped by ship. God then sent an impetuous wind across the sea and the ship was on the point of wrecking. The sailors decided to draw lots in order to know who among them was responsible for their misfortune. The dice fell on Jonas and they threw him into the sea and the storm calmed down (Jon 1:1-15).

The second passage refers to Mary, the mother of Jesus. The narration is not found in the canonical Gospels. According to Muslim commentators, Zachariah was hoping to have the guardianship over Mary after the death of her father, but others contested his right to do so. They therefore proceeded with throwing divinatory arrows into the river, in order to know who had such a right. The only arrow that floated was that of Zachariah, who then was given the responsibility of guardianship.

The recourse to these two passages which narrate Jewish practices in order to justify the drawing of lots is the application of the rule according to which norms revealed before Muhammad constitute a valid source of law even for the Muslims, as long as the norms are not expressly abrogated.¹

The *Sunnah* also confirms the possibility of having recourse to drawing lots. Al-Bukhari entitles a section of his collection "Drawing lots in problems." It is narrated in this regard that Muhammad used to draw lots to know who among his wives was to accompany him during his journey. One day two people in contention came to see Muhammad, each of them with his own witnesses. Muhammad solved their problem by drawing lots.

The companions of Muhammad used to draw lots to resolve conflicts. For instance, a woman slept with three men and gave birth to a child none of the three men wanted to acknowledge as his. 'Ali decided to attribute the child to one of them by drawing lots.

2) Domains of the application of drawing lots

Drawing of lots is not allowed in all domains. It can only be used where no norm to regulate the question at hand is known or where one is not certain about it. For this reason, jurists say that drawing lots aims at resolving problems. Muhammad said: "Whatever is unknown will be subjected to drawing lots."

It is necessary in this respect that objects to be shared by drawing lots be of equal quality and of the same species. The procedure has many applications in the field of public law and private law. Thus, one can have recourse to drawing lots when in front of two *imams* or two tutors of equal value. The same applies when the husband wants to go on a journey and would like that one of the wives accompany him, or when one marries two wives the same day and would like to know which one he should sleep with first. If a man swears to repudiate one of his wives, without designating which one, he can draw lots and send away the one on whom the lot falls. The judge can also draw lots over the plaintiffs in default of other clear criteria in order to determine who he should give the hearing to first. It goes with-

¹ For more information on this source, see Part II, chapter V.

out saying that if one party accepts of his own accord to give in, the drawing of lots becomes irrelevant.

A contemporary author says that political elections cannot be compared to drawing lots. The elections do not fulfil the conditions of the latter because they are often rigged, to the advantage of influential people; they waste time and money and cause hatred among the population.¹

Chapter IX. Rules and juridical adages

I. Juridical rules in the West

The Western jurist is accustomed to the use of juridical adages; also known as maxims, proverbs, aphorisms, dictums or juridical rules, characterized by conciseness, falling under logic, evidence, common sense or as a result of well elaborated reflection.

Adages, covering all the domains of law, are considered a variety of custom, having legal authority as long as they do not contradict legal texts. Some of these adages are literally² reproduced or paraphrased³ in law. Others, whilst not being expressed through legal texts, forming a body of superior principles constituting the framework of law, have the value of some constitutional kind and representing a real sopra-legality. They are known in that case as *supra legem*. Such is the case for such rules as *fraus omnia corrumpit* (fraud corrupts everything), *nulla poena sine lege* (no penalty without law), *tu patere legem quam fecisti* (face the consequences of your own law).⁴ In this sense, the adages constitute a source of law.

The Digest of Justinian reserves to the adages its last title (XVII) entitled *De diversis regulis juris antiqui*, which assembles 211 rules drawn from the writings of ancient jurisconsults. Many adages appear also in other parts of the *Digest* (namely in the title III of the first book) or in the institutes. The *Liber Sextus* of Pope Boniface VIII, promulgated in 1298, contains 88 rules under the title *De regulis juris*.⁵ But the Code of Canon Law of 1917 and that of 1983 deemed it unnecessary to consecrate a title to the adages.

In Sweden and in Finland, collections of national laws contain, since 1740, a chapter entitled "General rules of consideration." They are 48 in all and rule number 16 enumerates 21 maxims. Drafted around the year 1540, they constitute rules of deontology addressed to the judge.

¹ Al-Mazid: *Tahqiq al-sun'ah fi bayan ahkam al-qur'an*, p. 70-72.

² Such is the case for article 2279 of the French Civil Code.

³ Such is the case for articles 1138, 1165, 1315 and 1628 of the French Civil Code.

⁴ See the introduction of the work of Roland and Boyer: *Adages du droit français*, p. X1-XVIII. Concerning the adages, see Cornu: *Linguistique juridique*, pp. 357-407.

⁵ See the translation of these rules in *Dictionnaire de droit canonique*, 1984, vol. 4, tome 1, pp. 694-697. The English and French translation of 85 of these rules in <http://www.clf.gouv.qc.ca/Publications/PubB109/B109annexe.html>.

II. Juridical rules in Islamic law

Islamic law is familiar with the same phenomenon. A good number of Koranic verses enounce general principles often cited by Muslim authors. We cite here some of these principles:

But whoever is forced, and is not rebel nor transgressor, there is no sin upon him (87/2:173).

Do not eat up one another's wealth illicitly (87/2:188).

There is no compulsion in religion! (87/2:256).

God does not charge a soul but according to its capacity (87/2:286).

Consult them about the affair (89/3:159).

God commands you to restore deposits to their owners, and when you judge between the humans, to judge with justice (92/4:58).

O you who believed! Fulfil the contracts (112/5:1 and 50/17:34).

Help each other in goodness and fear [of God] and do not help each other in sin and enmity (112/5:2).

God does not want to lay upon you any hardship (112/5:6).

If you judge, then judge between them with equity (112/5:42).

No bearer of a burden can bear the burden of another (55/6:164).

God orders justice (70/16:90).

The reward of a misdeed is a similar misdeed (62/42:40).

Every man is a hostage to what he has earned (76/52:21).

That no laden [soul] will be laden with the load of others, that to the human reverts only [the fruit of] his endeavour (23/53:38).

Similar principles have been enounced in the hadiths of Muhammad. These verses and hadiths constitute a source of inspiration for concise phrases of the great classic Muslim jurists called in Arabic *Qawa'id fiqhiyyah* (normative legal maxims). The rules were collected and commented upon by classic Sunnite and Shi'ite authors.¹ Contemporary works² have been dedicated to them, often under the title of *Al-Ashbah wal-nadha'ir* (similarities and similars).³ This indicates that it is a question of rules used in analogy in search of solutions. The first positive adoption of such rules was done by the *Majallah*. The code starts with 99 juridical rules (arti-

¹ The oldest text we have is that of 'Abd-Allah Al-Karkhi (d. 952), a hanafite jurist. His work, entitled *Risalat Al-Karkhi fil-usul*, comprises 37 rules called "*usul*." Concerning classic works, see Al-Nadawi: *Al-qawa'id al-fiqhiyyah*, pp. 125-230 and 433-445; Al-Sarhan: *Al-qawa'id*, p. 15-34.

² We can cite in particular Hamzah: *Al-fara'id al-bahiyyah fil-qawa'id wal-fawa'id al-fiqhiyyah* (he is the most competent in this field, having 251 rules and many norms, classified according to subject); Al-Sarhan: *Al-qawa'id*; Al-Zarqa': *Sharh al-qawa'id al-fiqhiyyah*; Al-Kurdi: *Al-madkhal al-fiqhi*; Al-Nadawi: *Al-qawa'id al-fiqhiyyah*; Zaydan: *Al-wajiz fi sharh al-qawa'id al-fiqhiyyah*; Imam: *Nadhariyyat al-fiqh fil-islam*, p. 319-378.

³ For more information on these two terms, see Al-Nadawi: *Al-qawa'id al-fiqhiyyah*, p. 63-71.

cles 2-100). Citing these rules, the report of the commission that established the code says:

Section II of the preliminary dispositions is composed of general principles of law collected by Ibn-Nujaym (d. 1563)¹ and other jurisconsults of his school. Although the principles in themselves are not sufficient for the judge to give his judgment as long as he is not enlightened by more explicit texts of law, they are nonetheless of great use for the studying and understanding of law, by allowing to capture more easily the solution of each particular question. In them, administrative officials find guidance for all the cases they may face and each one could, by having recourse to them, conform as much as possible his actions to the precepts of sacred law.²

Sometimes the code in question renders explicit the sense of some rules through examples. The rules have also been the object of commentaries which indicate situations in which they are applied, as well as their limits.³ We limit ourselves here to citing these rules in original Arabic and in English translation, indicating at times the corresponding Latin rule, without for that matter insinuating that they come from the Roman law.⁴ We will indicate with an asterisk (*) the rules drawn from the hadiths of Muhammad, the others having been drawn from great classic jurists.

مادة 2 - الأمور بمقاصدها

*Article 2 – Matters are determined according to intention.⁵

مادة 3 - العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

Article 3 - In contracts, effect is given to intention and meaning and not words and forms.

Compare: *In conventionibus contrahentium voluntas potius quam verba spectanda sunt.*

مادة 4 - اليقين لا يزول بالشك

Article 4 – Certainty is not dispelled, (does not dispel cause), by doubt.

مادة 5 - الأصل بقاء ما كان على ما كان

Article 5 – It is a fundamental principle that a thing shall remain as it was originally.

مادة 6 - القديم يترك على قدمه

¹ Ibn-Nujaym: *Al-Ashbah wal-nadha'ir*.

² Young: *Code civil ottoman*, p. 173.

³ We cite in particular Haydar: *Durar al-hukkam*, pp. 17-88; Baz: *Sharh al-majallah*, pp. 17-63; Al-Zarqa': *Sharh al-qawa'id al-fiqhiyyah*; Al-Kurdi: *Al-madkhal al-fiqhi*. The first three commentaries follow the order of the *Majallah*. The latter classifies the rules by order of subject.

⁴ We base ourselves on Mahmassani: *The philosophy of jurisprudence in Islam* (text of the maxims in <http://www.global-islamic-finance.com/2009/07/99-islamic-legal-maxims.html>). The Latin rules have been principally borrowed from the English translation of Tyser, Demetriades and Efendi: *The Mejelle*, p. 3-15.

⁵ A hadith of Muhammad says: "Acts depend on intentions, and every person is rewarded according to his intentions."

Article 6 – Things which have been in existence from time immemorial shall be left as they were.

مادة 7 - الضرر لا يكون قديماً

Article 7 – Injury cannot exist from the time immemorial.

مادة 8 - الأصل براءة الذمة

Article 8 – Freedom from liability is a fundamental principle.

مادة 9 - الأصل في الصفات العارضة العدم

Article 9 – Non-existence is a fundamental presumption attached to intervening (transitory) attributes.

مادة 10 - ما ثبت بزمان يحكم ببقائه ما لم يوجد المزيل

Article 10 – Judgment shall be given in respect to any matter, which has been proof at any particular time, unless the contrary is proved.

مادة 11 - الأصل إضافة الحادث إلى أقرب أوقاته

Article 11 – It is a fundamental principle that any new event shall be regarded as happening at the time nearest to the present.

مادة 12 - الأصل في الكلام الحقيقة

Article 12 - In principles, word shall be construed according their real meaning.

مادة 13 - لا عبرة للدلالة في مقابل التصريح

Article 13 – No attention shall be paid to inferences (implication) in the face of an explicit statement.

Compare: *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*

مادة 14 - لا مسأغ للاجتهاد في مورد النص

Article 14 – Where there is a text there is no room for interpretation.

Compare: *Absoluta sententia expositore non indiget.*

مادة 15 - ما ثبت على خلاف القياس فغيره لا يقاس عليه

Article 15 – A thing established contrary to the *Qiyas* cannot be used as an analogy for other things.

مادة 16 - الاجتهاد لا ينقض بمثله

Article 16 - One legal interpretation does not destroy another.

مادة 17 - المشقة تجلب التيسير

Article 17 – Hardship begets facility.

مادة 18 - الأمر إذا ضاق اتسع

Article 18 – Latitude should be afforded in the case of difficulty.

مادة 19 - لا ضرر ولا ضرار

*Article 19 – Injury may not be met by injury.

Compare: *Injuria non excusat injuriam.*

مادة 20 - الضرر يزال

Article 20 – Injury is to be repaired.

مادة 21 - الضروريات تبيح المحذورات

Article 21 - Necessity renders prohibited things permissible.

Compare: *Necessitas non habet legem.*

مادة 22 - ما أبيح للضرورة يتقدر بقدرها

Article 22 – Necessity is determined by the extent thereof.

Compare: *Necessitas quod cogit, defendit.*

مادة 23 - ما جاز لعذر بطل بزواله

Article 23 – Whatever is permissible owing to some excuse ceases to be permissible with the disappearance of that excuse.

Compare: *Cessante relatione legis, cessat ipsa lex.*

مادة 24 - إذا زال المانع عاد الممنوع

Article 24 – When a prohibition is removed the thing to which such a prohibition was attached reverts to its former status of legality.

مادة 25 - الضرر لا يزال بمثله

Article 25 – An injury cannot be removed by a similar injury.

Compare: *Injuria non excusat injuriam.*

مادة 26 - يتحمل الضرر الخاص لدفع ضرر عام

Article 26 – A private injury is tolerated in order to ward off a public injury.

Compare: *Lex citius tolerare vult privatum damnum quam publicum malum.*

مادة 27 - الضرر الأشد يزال بالضرر الأخف

Article 27 – Severe injury is removed by lesser injury.

مادة 28 - إذا تعارض مفسدتان روعي أعظمهما ضرراً بارتكاب أخفهما

Article 28 – In the presence of two evils, the one whose injury is greater is avoided by the commission of the lesser.

مادة 29 - يختار أهون الشرين

Article 29 – The lesser of evils is preferred.

مادة 30 - درء المفساد أولى من جلب المنافع

Article 30 – Repelling an evil is preferable to securing benefit.

مادة 31 - الضرر يدفع بقدر الإمكان

Article 31 – Injury is removed as far as possible.

مادة 32 - الحاجة تنزل منزلة الضرورة عامة أو خاصة

Article 32 – Need, whether of a public or private nature, is treated as necessity.

مادة 33 - الاضطرار لا يبطل حق الغير

Article 33 – Necessity does not invalidate the right of another.

مادة 34 - ما حرم أخذه حرم إعطاؤه

Article 34 – When it is forbidden to take a thing it is also forbidden to give it.

مادة 35 - ما حرم فعله حرم طلبه

Article 35 – When it is forbidden to perform an act it is also forbidden to request its performance.

مادة 36 - العادة محكمة

Article 36 – Custom is authoritative.

مادة 37 - استعمال الناس حجة يجب العمل بها

Article 37 – Public usage is conclusive and action must be taken in accordance therewith.

Compare: *Optimus interpret rerum usus*.

مادة 38 - الممتنع عادة كالممتنع حقيقة

Article 38 – A thing that is customary to regard as impossible is considered to be impossible in fact.

مادة 39 - لا ينكر تغير الأحكام بتغير الأزمان

Article 39 – It is undeniable that rules of law vary with change in time.

مادة 40 - الحقيقة تترك بدلالة العادة

Article 40 – The original (real) meaning is to be regarded as being in favour of that established by custom.

مادة 41 - إنما تعتبر العادة إذا اطردت أو غلبت

Article 41 – Effect is only given to custom where it is of regular occurrence or when universally prevailing.

مادة 42 - العبرة للغالب الشائع لا للنادر

Article 42 – Effect is given to what is of common occurrence, not to what happens infrequently.

مادة 43 - المعروف عرفاً كالمشروط شرطاً

Article 43 – A matter recognized by custom is regarded as if stipulated by agreement.

Compare: *In contractibus tacite insunt, quae sunt moris and consuetudinis*.

مادة 44 - المعروف بين التجار كالمشروط بينهم

Article 44 – A matter recognized customary amongst merchants is regarded as if agreed upon between them.

مادة 45 - التعيين بالعرف كالتعيين بالنص

Article 45 – A matter established by custom is like a matter established by a legal text.

مادة 46 - إذا تعارض المانع والمقتضى يقدم المانع

Article 46 – When prohibition and exigency conflict, preference is given to prohibition.

مادة 47 - التابع تابع

Article 47 – An accessory which is attached to an object in fact is also attached to it in law.

Compare: *Accessorium non ducit sed sequitur suum principale.*

مادة 48 - التابع لا يقرر بالحكم

Article 48 – An accessory to an object cannot be dealt with separately.

مادة 49 - من ملك شيئاً ملك ما هو من ضرورياته

Article 49 – The owner of a thing held in the absolute ownership is also the owner of the things indispensable to the enjoyment of such things.

Compare: *Ubi aliquid conceditur, conceditur and id sine quo res ipsa non potest.*

مادة 50 - إذا سقط الأصل سقط الفرع

Article 50 – If the principle fails, the accessory also fails.

Compare: *Quum principalis causa non consistit, ne ea quidem quae sequuntur locum habent.*

مادة 51 - الساقط لا يعود

Article 51 – A thing which has been discharged or annihilated cannot be restored.

مادة 52 - إذا بطل شيء بطل ما في ضمنه

Article 52 – When a thing becomes void, the thing contained in it also becomes void.

Compare: *Sublato principali tollitur adjunctum.*

مادة 53 - إذا بطل الأصل يصار إلى البديل

Article 53 – When the original fails it is restored to its substitute.

مادة 54 - يغتفر في التوابع ما لا يغتفر في غيرها

Article 54 – A thing which is not permissible in itself, may be permissible as an accessory.

مادة 55 - يغتفر في البقاء ما لا يغتفر في الابتداء

Article 55 – A thing which is not permissible by way of commencement may be permissible by way of continuance.

مادة 56 - البقاء أسهل من الابتداء

Article 56 – Continuance is easier than commencement.

مادة 57 - لا يتم التبرع إلا بقبض

*Article 57 – A gift becomes complete by delivery.

مادة 58 - التصرف على الرعية منوط بالمصلحة

Article 58 – Management of citizen's affairs is dependent upon public welfare.

مادة 59 - الولاية الخاصة أقوى من الولاية العامة

Article 59 – Private trusteeship is more effective than public trusteeship.

مادة 60 - أعمال الكلام أولى من إهماله

Article 60 – A word should be construed as having some meaning, rather than disregarded.

مادة 61 - إذا تعذرت الحقيقة يصار إلى المجاز

Article 61 – When the real meaning cannot be applied, the metaphorical sense may be used.

مادة 62 - إذا تعذر إعمال الكلام يهمل

Article 62 – If no meaning can be attached to a word it is disregarded altogether.

مادة 63 - ذكر بعض ما لا يتجزأ كذكر كله

Article 63 – A reference to a part of an indivisible thing is regarded as a reference to the whole.

مادة 64 - المطلق يجري على إطلاقه إذا لم يقم دليل التقييد نصاً أو دلالة

Article 64 – The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the explicit text or by implication.

مادة 65 - الوصف في الحاضر لغو وفي الغائب معتبر

Article 65 – A description with reference to a thing present is of no consequence, but the contrary is the case if such a thing is not present.

مادة 66 - السؤال معاد في الجواب

Article 66 – A question is considered to have been repeated in the answer.

مادة 67 - لا ينسب إلى ساكت قول لكن السكوت في معرض الحاجة بيان

Article 67 – No statement is imputed by to a man who keeps silence, but silence is tantamount to a statement where there is a necessity for speech.

Compare: *Qui tacet, consentire videtur ubi loqui potuit and debuit.*

مادة 68 - دليل الشيء في الأمور الباطنة يقوم مقامه

Article 68 – In obscure matters the proof of a thing stands in the place of such a thing.

Compare: *Acta exteriora indicant interiora secreta.*

مادة 69 - الكتاب كالخطاب

Article 69 – Correspondence resembles conversation.

مادة 70 - الإشارة المعهودة للأخرس كالبيان باللسان

Article 70 – The recognized signs of a dumb person take the place of a statement by word of mouth.

مادة 71 - يقبل قول المترجم مطلقاً

Article 71 – The word of an interpreter is accepted in every respect.

مادة 72 - لا عبرة بالظن البين خطأه

Article 72 – No validity is attached to conjecture which is obviously tainted by error.

مادة 73 - لا حجة مع الاحتمال الناشئ عن الدليل

Article 73 – No argument is admitted against supposition based upon evidence.

مادة 74 - لا عبرة للتوهم

Article 74 – No weight is attached to fancy.

مادة 75 - الثابت بالبرهان كالثابت بالعيان

Article 75 – A thing established by proof is equivalent to a thing established by visual inspection.

مادة 76 - البينة للمدعي واليمين على من أنكر

*Article 76 – The burden of proof is on him who alleges; the oath on who denies.

مادة 77 - البينة لإثبات خلاف الظاهر واليمين لبقاء الأصل

Article 77 – The object of evidence is to prove what is the contrary to the apparent fact.

مادة 78 - البينة حجة متعدية والإقرار حجة قاصرة

Article 78 – Evidence is an absolute proof in that it affects a third person; admission is relative proof in that it affects only the person making such admission.

مادة 79 - المرء مؤاخذ بإقراره

Article 79 – A person is bound by his own admission.

مادة 80 - لا حجة مع التناقض لكن لا يخلل معه حكم الحاكم

Article 80 – Contradiction and proof are incompatible, but this does not invalidate a judgment.

مادة 81 - قد يثبت الفرع مع عدم ثبوت الأصل

Article 81 – Failure to establish the principal claim does not imply failure to establish a claim subsidiary thereto.

مادة 82 - المعلق بالشرط يجب ثبوته عند ثبوت الشرط

Article 82 – Anything dependent upon a precedent condition is established on the happening of the condition.

مادة 83 - يلزم مراعاة الشرط بقدر الإمكان

Article 83 – A condition must be fulfilled as far as possible.

مادة 84 - المواعيد بصور التعاليق تكون لازمة

Article 84 – Promises dependent upon a precedent condition are irrevocable.

مادة 85 - الخراج بالضمان

*Article 85 – The enjoyment of a thing is the compensating factor for any liability attaching thereto.

Compare: *Qui sentit onus, sentire debet and commodum.*

مادة 86 - الأجر والضمان لا يجتمعان

Article 86 – Remuneration and liability do not run together.

مادة 87 - الغرم بالغنم

Article 87 – Liability is an obligation accompanying gain.

Compare: *Qui sentit commodum sentire debet and onus.*

مادة 88 - النعمة بقدر النعمة والنعمة بقدر النعمة

Article 88 – The burden is in proportion to the benefit and the benefit to the burden.

مادة 89 - يضاف الفعل إلى الفاعل لا الأمر ما لم يكن مجبراً

Article 89 – The responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such act, provided that such a person does not compel the commission thereof.

مادة 90 - إذا اجتمع المباشر والمتسبب أضيف الحكم إلى المباشر

Article 90 – In the presence of the direct author of an act and the person who is the cause thereof, the first alone is responsible therefor.

Compare: *Causa proxima, non remota spectatur.*

مادة 91 - الجواز الشرعي ينافي الضمان

Article 91 – Legal permission is incompatible with liability.

مادة 92 - المباشر ضامن وإن لم يتعمد

Article 92 – "Liability lies on the direct author of an act, even though acting unintentionally.

مادة 93 - المتسبب لا يضمن إلا بالتعمد

Article 93 – No liability lies on a person who is the cause of an act unless he has acted intentionally.

مادة 94 - جناية العجماء جبار

*Article 94 – No liability is binding in connection with injury caused by animals of their own accord.

مادة 95 - الأمر بالتصرف في ملك الغير باطل

Article 95 – Any order given for dealing with the property of others is void.

Compare: *Nemo dat, quod non habet.*

مادة 96 - لا يجوز لأحد أن يتصرف في ملك الغير بلا إذنه

Article 96 – No person may deal with the property of another without such person's permission.

مادة 97 - لا يجوز لأحد أن يأخذ مال أحد بلا سبب شرعي

Article 97 – No person may take another person's property without legal cause.

مادة 98 - تبدل سبب الملك قائم مقام تبدل الذات

Article 98 – Any change in the cause of the ownership of a thing is equivalent to a change in that thing itself.

مادة 99 - من استعجل الشيء قبل أوانه عوقب بحرمان

Article 99 – Any person, who hastens the accomplishment of a thing before its due time, is punished by being deprived thereof.

مادة 100 - من سعى في نقض ما تم من جهته فسعيه مردود عليه

Article 100 – If any person seeks to disavow any act performed by himself, such attempt is disregarded.

Compare: *Nemo contra factum suum venire potest. Allegans contraria non est audiendus.*

These rules are reproached of not distinguishing principle rules from derived ones, as well as the lack of systemization. In spite of such criticism, the rules of the *Majallah* have a great influence on modern codes, as we shall see in the following point. Courses in faculties of law and Islamic law are dedicated to them.

III. Juridical rules in modern Arab codes

The Egyptian civil code which came into force on 15 October 1949 did not reserve any chapter to juridical rules, contrary to other codes that were inspired by it. The latter reproduced part of the principles mentioned in the *Majallah*, with some formal modifications, by adding to it some other rules. The rules are either regrouped at the beginning of the code, or dispersed in accordance with their object. We indicate here the articles where the reader can find these rules, without any pretension to being exhaustive:

- The Iraqi civil code of 1951: articles 2-6, 8, 81, 118, 155-166, 186 paragraph 2, 212 paragraph 1, 213 paragraph 1, 214 paragraph 1, 215 paragraph 1, 216 paragraph 1, 221.
- The Jordanian civil code of 1976: articles 61-65, 73-85, 213-238.
- The Yemen civil code of 1979: articles 4 to 18.
- The Sudanese civil code of 1984: articles 5, 28, 96-100, 142 paragraph 1, 143 paragraph 1.
- The United Arab Emirates civil code of 1985: articles 29-70.
- The unified civil code of the Arab League: articles 1-85.¹
- The unified civil code of the Cooperation Council of the Gulf Arab States of 1998: articles 1-85.

¹ <http://www.carji.org/sites/default/files/civil-law-part1.pdf>.

Part III.

Implementation of the norms

After having identified the sources of Islamic law, the jurist must resolve the conflicts between the sources and understand the norms they enounce through linguistic and teleological interpretation. He must then determine the content of the norm, its addressee and its beneficiary, and see how far it can be mitigated. This is what we shall see in this part.

Chapter I.

Conflicts between sources

We have seen above the different sources from which juridical norms are drawn. What should be done when the sources are not concordant, resulting in contradicting solutions?

Jurists affirm at once that there cannot be any contradiction between norms of the Islamic legislation. That would be accusing God, its author, of incoherence. Based on this presumption, they affirm that every opposition can only be apparent and not real. It only takes place in the spirit of the addressee and it is up to him to surpass this incoherence by having recourse to the institutions of abrogation (*naskh*) and conciliation (*tawfiq*).

I. Abrogation (*naskh*)

Abrogation is defined in Islamic law as follows: the nullification of the application of a prescription of the *Shari'ah* on the basis of a posterior indication announcing explicitly or implicitly the nullification, totally or partially.

Abrogation is a common occurrence in democratic systems where the law changes periodically according to circumstances and interests of society. But the concept shocks believers for whom God and his Prophet are perfect. They perceive abrogation as an infringement on this perfection, by reason of the contradiction it implies. In the past, hundreds of works were dedicated to this domain.¹ Today, abrogation still provokes many controversies among contemporary authors who dedicate to it entire works, not to mention the long chapters in the books dedicated to the principles of law.² The question is so delicate that it cost the life of the Sudanese thinker Mahmud Muhammad Taha, hanged in 1985 by Numeiri, for having defended his own concept of abrogation. In 1975, president Ziad Berri of Somalia used to say in his public discourse that half of the Koran is abrogated or contradictory and that,

¹ For a detailed list of old works dedicated to abrogation, see Al-Saffar: *Mu'jam*, pp. 623-636.

² We have in our hands seven contemporary works on abrogation. Two of them refute abrogation (Al-Saqqa: *La naskh*; Al-Jabri: *Al-nasikh*) and five approve of it (Al-'Aris: *Al-adillah*; Hamzah: *Dirasat*; Isma'il: *Nadhariyyat*; Wafa: *Ahkam*; Al-'Amri: *Al-naskh*).

by consequence, it is no longer applicable. He attracted condemnation from Al-Azhar on 6 February 1975.¹

The first question which we should answer is one of knowing whether abrogation is possible or not in Islamic law.

1) Possibility and negation of abrogation

The vast majority of Muslim jurists affirm that abrogation is possible. They consider that God, in the interest of the progress of a society in continuous evolution, allows for the evolution of the norms he has instituted for society, as does every legislator. Nonetheless, a difference subsists. Whereas the human legislator, in promulgating a law, ignores whether it will be in force forever or whether it would have to change, God cannot be accused of ignoring the future of the law. This would amount to infringing on the omniscience of God. In promulgating a law, God knows in advance the duration of the validity of the law and how he expects to change it in the future. The jurists support their thesis through the Koran which also acknowledges the existence of abrogation (see below). They add that a certain number of verses or hadiths contradict themselves, contradictions which could only be understood if one admits that some verses are abrogated by others. But they do not agree on the number of the Koranic verses that have been abrogated: between several hundreds and about ten. We shall come back to this later. We should precise here that there cannot be any abrogation of the verses or the hadiths of Muhammad after the death of the latter, the norms having been fixed once and for all.

On the other hand, there are those who deny the existence of abrogation. This minority position was defended in the past notably by Abu-Muslim Al-Asfahani (d. 934). It is still upheld by some Muslim authors, of whom 'Abd-al-Mit'al Muhammad Al-Jabri who cites the support of the Koran: "It is a book whose signs are perfected and then detailed from a wise, an aware" (52/11:1). He points out that nowhere does the Koran say in an express manner that such a text must be abrogated by another one. He adds that one can always oppose an argument, contrary to those who pretend that a verse has been abrogated. He does not exclude the fact that the theory of abrogation may have been introduced into Islam by Jews in order to confuse Islam.² This opinion is followed by Ahmad Hijazi Al-Saqqa.³ He points out that Christian missionaries use abrogation to attack Islam and in 1972 pamphlets were distributed in Mansurah, in Egypt, stirring the subject in order to create doubts among Muslims. This motivated him to produce his work. For such a minority trend, it is always possible to conciliate two opposite texts through interpretation and a determination of the area of the application of the controversial verses.

2) Abrogation in other religions

As we have just seen, abrogation was recuperated by the polemicists. Contemporary Muslim authors insist on the fact that Islam is not the only one affected by the phenomenon. They cite the following examples of abrogation in the Old and New Testaments:

¹ Al-Saqqa: *La naskh*, p. 5-6.

² Al-Jabri: *Al-nasikh*, p. 8-10. Other author refutes abrogation: Al-Saqqa: *La naskh*.

³ Al-Saqqa: *La naskh*, p. 225.

In the Old Testament, it is observed that some marriages with whom one has a blood relationship were initially permitted. An ulterior norm then came to forbid them: before Moses, marriage between brothers and sisters was allowed, as demonstrated by the story of Abraham and Sarah (Gn 20:10-12). Later, such a marriage was forbidden (Lv 18:9) and punished by death (Lv 20:17). Jacob married two sisters, Leah and Rachel (Gn 29: 21-30). This was forbidden (Lv 18:18). 'Imran, the father of Moses, married his aunt (Ex 6:20). This was forbidden (Lv 18:12). God allowed Noah and his sons to consume "every moving thing that lives" (Gn 9:1-3), but later the Bible restricted the authorization by forbidding a good number of animals (Lv chapter 11).

In the Gospel, Jesus declared: "Do not think that I have come to abolish the law or the prophets; I have come not to abolish but to fulfil" (Mt 5:17). Elsewhere, Jesus and his apostles amended the Law of Moses. For instance, biblical taboos related to food were suppressed by Jesus' apostles (Ac 10:12-16, and Rm 14:14). Jesus, and the disciples after him, nullified the rest of Saturday and other Jewish holidays (Mt 12:1-12; Jn 5:16; 9:16; Col 2:16). The Bible demands the circumcision of Abraham and his descendants, from generation unto generation (Gn 17:9-14), but its obligatory character was abrogated by the apostles (Ac chapter 15; Ga 5:1-6 and 6:15). The Bible prescribes stoning to death (Lv 20-10, and Dt 22:22-23), but Jesus refused to apply it (Jn 8:4-11). The Bible prescribes the law of retaliation (Ex 21:24), but Jesus decreed: "You have heard that it was said: an eye for an eye and a tooth for a tooth. But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also" (Mt 5:38-39).¹

3) Abrogation of the other religions by Islam

The attitude of Christians towards Jews is also found among the Muslims with regard to the former two groups.

Muslim authors, including contemporary ones, affirm that the teaching of Muhammad abrogated the other two religions. Several verses of the Koran are cited in support of this concept. There are above all verses which sanction the universal character of Islam, of which:

We only sent you as an announcer and a warner for all humans (58/34:28).

Say: "O humans! I am God's messenger to you all, to whom belongs the kingdom of the heavens and the earth (7:158).

There is then the famous verse which says:

Whoever seeks as religion other than the Islam, it will not be accepted from him, and he will be, in the last [life], of the losers (89/3:85).

In spite of that, Muslim jurists have admitted that recognized communities keep their laws and their jurisdictions.² In the same way, they admit that laws which

¹ For more information about abrogation in the Old and New Testament, see Al-Saqqa: *La naskh*, 29-41 and Isma'il: *Nadhariyyat*, p. 43-60.

² See Part I, chapter III.I.

preceded Muhammad mentioned in the Koran and the *Sunnah* should be applied also to the Muslims except if they are explicitly or implicitly abrogated.¹

4) Abrogation in the Koran

A) God abrogates laws

During the time of Muhammad, his adversaries used to accuse him of modifying the orders given to the believers. It was then that Koranic verses were revealed according to which it is God who had willed the change through abrogation:

Whatever sign we abrogate or cause to be forgotten, we bring one better than it or similar to it. Do you not know that God is powerful on everything? (87/2:106).

When we change a sign in place of another sign, and God knows best what he descends, they say: "You are but a forger." Rather most of them do not know (70/16:101).

Should we believe that God changed his opinion? Would he have initially been mistaken in the norms and then set things back on track? No, affirms the Koran, God always has at his disposal, since eternity, the complete text, the archetype, but he reveals it by stages.

God erases and consolidates whatever he wishes, and with him is the mother of the book (96/13:39).

Since there is a possibility of change in the divine norms, why then would Muhammad not change at will some norms. The Koran echoes the controversy and God responds:

When our manifest signs are recited to them, those who do not hope for our meeting say: "Bring a Koran other than this" or: "Change it." Say: "It is not for me to change it on my own. I only follow what is revealed to me. If I disobey my Lord, I fear the punishment of a great day" (51/10:15).

Classic Muslim jurists have not reached an agreement as to the number of abrogated Koranic verses. Some estimate the number of abrogated verses to be 572 (one eleventh of the verses of the Koran). According to this opinion, three complete chapters of the Koran may have disappeared as a result of abrogation.² Ibn-Salamah (d. 1019) makes an inventory of 238 abrogated verses related to some 65 out of 114 chapters of the Koran.³ Aware of the controversial character of the theme, contemporary authors adopt a prudent approach, as did Al-Suyuti (d. 1505) in the past. He made an inventory of 19 abrogated verses only. Subhi Al-Salih thinks that this is still too much and that they can be reduced to around ten.⁴ Muhammad Hamzah gives a list of 22 verses of which some are controversial.⁵ A re-

¹ See Part II, chapter V.

² Al-Jabri: *Al-nasikh*, p. 108-115.

³ Ibn-Salamah: *Al-nasikh*.

⁴ Al-Salih: *Mabahith*, p. 274.

⁵ Hamzah: *Dirasat*, p. 135-186. For a further study concerning abrogated verses, see also Al-'Aris: *Al-adillah*, p. 62-125.

cent work reviews, chapter by chapter, the verses alleged to have been abrogated and those that abrogated them and contested such an abrogation.¹

Muslim jurists have identified different categories of abrogation within the Koran of which we speak in the subsequent point.

B) A verse abrogating another, both of them in the Koran

The abrogated Koranic verses of this category remain always in the Koran and are the object of commendable pious recitation. They are chanted by the muezzin even when they have no normative value. Muslim jurists speak then of the abrogation of the ruling (*hukm*) and the maintenance of the recitation (*tilawah*). As an example, we can cite the following verses:

- Verse 87/2:115 in relation to prayers says: "To God belong the east and the west. So wherever you turn to, there is the face of God. God is ample, knower." It may have been abrogated by the verse 87/2:144 which fixes the direction of prayer towards the Ka'aba in Makka: "So turn your face to the forbidden Sanctuary. Wherever you may be, turn your faces to it."
- The verse 87/2:217 forbids fighting during the sacred month: "They ask you about the prohibited month: "Is there combat in it?" Say: "The combat [in this month] is a great [sin]." It may have been abrogated by the shortened verse 113/9:5: "kill the associators wherever you find them" or by the verse 113/9:36: "Combat the associators all together, as they combat you all together."
- The verse 102/24:3 of biblical origin² says: "The fornicator shall not marry save a fornicatress or an associating woman, and the fornicatress none shall marry save a fornicator or an associator. This has been forbidden unto the believers." This may have been abrogated by the verses 102/24:32: "Marry the singles among you and the righteous among your servants and maids. If they are poor, God enriches them from his favour."
- The verse 87/2:240 fixes the duration of upkeep of one year for a widow: "Those of you who die and leave wives behind, [should make] a bequest of enjoyment for a year in favour of their wives." The duration was modified by the verse 87/2:234: "Those of you who die and leave wives behind, they must wait for four months and ten [days]. When they reached their term, there is no blame on you for what they do for themselves according to usage." It is to be noted here that the abrogating verse is found before the abrogated verse!
- The verse 87/2:180 says: "It is prescribed for you, when death is present to any of you, if he leaves any goods, a bequest for parents and relatives according to usage. It is a duty for the [God-]fearing." It may have been abrogated by the verse 92/4:11 which fixes the share of the children: "God enjoins you concerning your children: The male shall have the equal of the share of two females..."

¹ Al-Hafni: *Mawsu'at al-Qur'an al-'adhim*, vol. II, p. 1482-1535.

² The prohibition is based on Dt 23:3: "No Ammonite or Moabite shall be admitted to the assembly of the Lord. Even to the tenth generation, none of their descendants shall be admitted to the assembly of the Lord."

C) A verse abrogating another, both of them having disappeared from the Koran

Some normative verses may have been revealed to Muhammad, but later the verses may have been replaced by other normative verses with a different content. But neither the former nor the latter had been included in the Koran. For instance, the revelation may have contained, according to the testimony of Ayshah, the wife of Muhammad, a verse establishing the prohibition of marriage between foster relatives should there have been more than ten breastfeeds, a number reduced to five by another verse. The two verses have disappeared from the Koran.

D) A verse contained in the Koran abrogated by one that has disappeared from the Koran

It is the most surprising category in this domain. The Koran says:

The fornicatress and the fornicator, you shall lash each of them one hundred lashes. Let not pity for them detain you in God's religion, if you believe in God and the last day. Have a group of the believers witness their punishment (102/24:2).

The verse is still found in the Koran but it is said to have been abrogated by another verse reported by the Caliph 'Umar (d. 644) which does not appear in the Koran and of which the expression would be:

If an old man and an old woman commit fornication, stone them to death, as a punishment coming from God.

In this line, it is reported that the Caliph 'Umar assembled in the mosque the principal companions of the Prophet and said to them from the pulpit: "O companions of the Messenger of God, the passage of the Holy Book concerning stoning came from heaven, the Prophet read it and we read it ourselves; later, the passage had been revoked and, although we did not recite it any more, the Prophet himself and the Caliph Abu-Bakr (d. 634) allowed stoning and even I myself allowed stoning." All the companions kept silence. Muslim sources do not say why this verse was not inserted in the Koran. Those who endeavour to reform Muslim norms in matters of adultery, such as Kaddafi, reject this category of abrogation and consider that the penalty to be applied is that mentioned in the Koran and not the one mentioned in a verse that has disappeared from the Koran.

E) Outright omission of the verses

According to many hadiths, God used to make Muhammad forget verses revealed the day before. The verses, sometimes transcribed by his secretaries, were obliterated by a miracle. Those who had memorized them also forgot them by a miracle. The Koran echoes this phenomenon:

We will make you read. Do not forget. Except what God wishes. He knows what is manifest and what is hidden (8/87:6-7).

Whatever sign we abrogate or cause to be forgotten, we bring one better than it or similar to it. Do you not know that God is powerful on everything? (87/2:106)

F) Abrogation of the satanic verses

The Koran affirms that God can intervene in order to withdraw from revelation what the Devil succeeded to introduce into it:

We did not send, before you, neither a messenger nor prophet but, when he desired, Satan threw [the doubt] in his desire. God abrogates what Satan throws, and then God makes decisive his signs. God is knower, wise (103/22:52).

Two verses that have disappeared from the Koran are considered by commentators to have been revealed by the Devil to Muhammad. Salman Rushdie made out of them the title of his book *The Satanic Verses*. He dedicated to them a chapter of around forty pages in order to illustrate the combat between good and evil.¹ Let us see what this is about.

The Koran says:

Have you seen Al-Lat and Al-Uzza, and the other, Manat, the third? Do you have the male, while he has the female? That is a disgraceful division! They are nothing but names you have named, you and your fathers and for which he did not descend any [argument of] authority. They only follow the presumption and what [their] souls desire, whereas the guidance has come to them from their Lord (23/53:19).

According to the commentators of the Koran, after the question mark of the first phrase there were the two following verses:

They are Sublime Goddesses; their intercession is definitely desired.

The recitation of these two verses by Muhammad raised indignation in his entourage which saw in it a concession in favour of the polytheists, contrary to the dogma of the Oneness of God.² Muhammad retracted declaring that the two verses were revealed by Satan. He also denounced the pact with polytheists (113/9:7-11) and declared an all-out war against them through the famous verse called *the verse of the sword*:

Once the forbidden months are over, kill the associators wherever you find them. Take them, besiege them and lie in wait for them in every ambush. If they repent, perform the prayer and give the purifying [alms], then let them go their way. God is forgiver, very-merciful (113/9:5).

In order to avoid every ambiguity, the two verses were suppressed or replaced by those that are now found in 21-22. Commenting on the above mentioned verse 103/22:52, Shaykh Hamza Boubakeur wrote on the question, basing himself on the famous exegesis of Al-Tabari (d. 923):

Idolaters of Makka, after having derided Muhammad, banished him from society. The Prophet suffered enormously from the situation, the sarcasm and mockery of his fellow citizens. Polytheists had more than once offered him a com-

¹ Rushdie: *Les versets*, p. 107-144.

² According to the Koran, at one time Muhammad used to worship divinities of other people, and he was later forbidden by God. See verses 55/6:56 and 60/40:66.

promise between his and their religion. Fed up with waiting, he too thought about it, but no revelation came to satisfy his wishes.

However, one day when the noble men of Makka, sitting under the shade of the temple according to their habit, were conversing, the Prophet arrived and started reciting surah 53. When he reached verse 19, he gave an inexact version, more in conformity with his own intimate desire than with the reality of the revelation.

The version capacitated the Qurayshite divinities and acknowledged their power to intercede. He prostrated himself and everyone else did the same. The new religion seemed to endorse idolatry to the satisfaction of everyone. However, the Prophet took no time to perceive his misconception. He retracted, by re-establishing the verse under its true form and tormented himself for having attributed lies to God. The revelation of the verse [103/22:52] – logically posterior to the one of surah 23/53:19 – blames the error in question on Satan, consoles and re-assures the Prophet.¹

5) Abrogation in the relationship between the Koran and the *Sunnah*

A) Abrogation of a Koranic verse by words of Muhammad

In positive law, a law can only be abrogated by a hierarchically superior or equal norm. Thus, a law can abrogate a decree, but a decree cannot abrogate a law. The problem was also raised by Al-Shafi'i (d. 820) who contests the possibility of abrogating the Koran by the *Sunnah*. He supports his argument with two Koranic verses:

[...] with the proofs and the scriptures. We descended to you the remembrance, so that you show to the humans what was descended for them. Maybe they think! (70/16:44).

When we change a sign in place of another sign, and God knows best what he descends, they say: "You are but a forger." Rather most of them do not know (70/16:101).

According to the two verses and other verses cited above under number 4.A, only God can abrogate a Koranic norm by another. They further point out that the *Sunnah* has its legitimization in the Koran and cannot therefore be cited against its own basis.

But the majority of Muslim authors accept that a Koranic norm can be abrogated by the *Sunnah*, the latter being an integral part of the revelation. Abrogation, in the two cases, is the work of God. Nowadays, however, contemporary authors are trying again and endeavour to limit to the maximum the application of Islamic law, by exclusively having recourse to the Koran.²

An example of the abrogation of the Koran by the *Sunnah* concerns the testament. The Koran says:

¹ *Le Coran*, translation of Hamza Boubakeur, vol. I, p. 1131. See also Al-Tabari: *Tafsir*, vol. 7, tome 17, p. 131-134. The tradition is, however, fought against by other exegetes such as Al-Razi (see Al-Razi: *Al-tafsir*, tome 23, p. 49-55).

² See Part IV, chapter I.III.

It is prescribed for you, when death is present to any of you, if he leaves any goods, a bequest for parents and relatives according to usage. It is a duty for the [God-]fearing (87/2:180).

The verse had been abrogated by the words of Muhammad: "No legacy for the heir."

Unique hadiths posed problems. Thus, the Koran affirms: "There is no compulsion in religion!" (87/2:256), but Muhammad said: "He who abandons his religion, kill him." The hadith is cited, even today, to punish the apostate, a point of view that is not shared by liberal authors.¹

B) Abrogation of the word of Muhammad by a Koranic verse

The question does not practically pose any problem. Thus, the amnesty pact signed between Muhammad and Makka (before its conquest) contained a clause according to which Muhammad was to hand over to Makka every man who would convert to Islam in order to join him. The accord was, however, abrogated by the verse 91/60:10:

O you who believed! When the believing women come to you as emigrants, examine them. God knows best their faith. If you know that they are believer, do not return them to the disbelievers. They are not permitted [as wives] to them, and they are not permitted to them [as husbands]

Prayer at the beginning of Islam was done facing Jerusalem, under the instruction of Muhammad. Later, verse 87/2:144 cited above came to indicate that henceforth the direction of prayer was to be towards Makka.

Sexual intercourse during the night was forbidden for those fasting. This was abrogated by verse 87/2:187:

It is permitted to you, the night of the fasting, to have sexual intercourse with your wives. They are a garment for you and you are a garment for them. God knows that you were betraying yourselves, and he turned to you and forgave you. Now approach them and seek what God has written for you. Eat and drink until the white thread appears to you distinct from the black thread at dawn. Then complete the fasting until the night. But do not approach them while you cleave to the sanctuaries. Those are God's bounds. Do not approach them. So God makes manifest his signs to the humans. Maybe they fear [God]!

After the battle of Badr (in 624), Muhammad accepted to liberate the prisoners against a ransom, but the Koran disapproved of his decision through verse 88/8:67:

It is not for a prophet to have captives until he has greatly slaughtered on the earth. You want the transient goods of the worldly life, while God wants the last [life]. God is mighty, wise!

C) Abrogation of a Sunnah by another

A recurring hadith can abrogate another earlier recurring hadith, both of them being of equal value on the level of authenticity. The same goes for unique hadiths: the ones being able to abrogate the others. The abrogation of a hadith by a recur-

¹ Al-Mahmasani: *Arkan*, p. 123-124.

ring hadith does not pose any problem. But what about the contrary? Can a unique hadith abrogate a recurring hadith? Al-'Amri, a contemporary author, endeavours to respond by making some distinctions: what was accepted at the time of Muhammad as abrogating and abrogated must continue to be so, but after the death of Muhammad a unique hadith cannot be cited in order to abrogate the Koran or the *Sunnah*. He bases himself on the authority of Al-Ghazali (d. 1111).¹

6) Multiple abrogations

There are cases of abrogation of an abrogating verse that was later abrogated by another, the latter being in turn abrogated by the words of Muhammad. Muslim authors attribute the fluctuation of the norm to the progressive character of the Muslim legislation. The famous case is the one of the prohibition of the consumption of wine.

They ask you about wine and gambling. Say: "In both there is a great sin and some benefits for the humans; but their sin is greater than their benefit" (87/2:219).

O you who believed! Do not approach the prayer when you are intoxicated until you know what you say (92/4:43).

O you who believed! Wine, gambling, erected stones and [divinatory] arrows are only abomination, work of Satan. Avoid them. Maybe you succeed! Satan only wants to throw enmity and hatred among you through wine and gambling, and to divert you from the remembrance of God and the prayer. Will you therefore not desist? (112/5:90-91).

The above are therefore three Koranic verses abrogating one another, without foreseeing any penalty and which were abrogated by a hadith of Muhammad according to which he flogged a wine drinker.

7) Abrogation in the relationship between consensus, the Koran and the *Sunnah*

Consensus (*ijma'*) plays an important legislative role in democratic systems. It flows from their concept of sovereignty. Normally, that should not be the case in Islam, in what concerns the domains resolved by the Koran or the *Sunnah*.

And yet, the question remains open. The Koran gives to the mother a third of the inheritance, and if the deceased has brothers, she only receives one sixth (92/4:11). The word "brothers" in Arabic designates the plural, rather than two. The norm, however, may have been changed and the mother even found herself accorded one sixth if the deceased has only two brothers. Questioned, 'Uthman (d. 656) declared that this was the decision of the nation (*qawm*).

A second example concerns the sharing of the national revenues of which a part should be given to people expected to have a favourable attitude towards Islam: "those whose hearts are rallied" (113/9:60). The attribution may have been suppressed later by the first Caliph Abu-Bakr (d. 634) with the unanimous accord of the companions of Muhammad.

¹ Al-'Amri: *Al-naskh*, p. 483.

We can also cite in this domain the payment of the tribute (*jizyah*) by the non-Muslims mentioned in verse 113/9:29:

Combat those who do not believe in God nor in the last day, nor forbid whatever God and his messenger have forbidden, nor profess the religion of the truth, among those who were given the book, until they give the tribute with a [willing] hand, while they are belittled

In fact, the tax was suppressed in 1855 by the Ottoman Empire¹ and nowadays it is only exacted by certain Muslim factions.²

8) Abrogation in the relationship between analogy and the hadith of Muhammad

Jurists diverge when a hadith contradicts an analogy. Some consider that analogy has priority over the hadiths. Abu-Hurayrah (d. 678) reports a hadith according to which it is necessary to perform ablutions in order to purify oneself of what touched fire. Ibn-'Abbas (d. towards 686) retorted: "Supposing that you are performing ablutions with warm water, should you perform the ablution to purify yourself?" Abu-Hurayrah (d. 678) reports also a hadith according to which he who transports the dead during the funeral must perform the ablutions (a requirement corresponding to a Jewish norm). Abu-'Abbas retorted: "Would you perform ablution because you had transported dry branches?"

Other jurists consider that hadiths have priority over analogy because they are a text, whereas an analogy is an opinion. Thus, 'Umar (d. 644) accepted the hadith according to which the wife inherits the price of the blood of the murdered husband. Yet, according to the rule, one can only inherit what the deceased had before dying, whereas the price of the blood is only after the death. Similarly, 'Umar accepted the hadith according to which it is necessary to pay the price of blood for the foetus, whereas, according to analogy, one owes the price of blood only if the person was alive before the attempt on his life. Muhammad had established that compensation for an amputated hand was fifty camels. 'Umar considered that if it were the fingers that were cut off, one should not pay ten camels for every finger cut, but in proportion to the utility of each finger. Jurists, however, have asked for a payment of ten camels for every finger, following thus the narration which 'Umar was not aware of, according to which Muhammad had said that the compensation for each finger was ten camels.

Other jurists consider that hadiths can have priority over analogy only if the reporter of the hadith is someone competent in law and hadiths. If by contrast, it is a matter of an ordinary reporter, it should not be taken into account. Yet, a reporter can give the meaning of a hadith only if he is competent in the domain of the hadiths.

¹ Aldeeb Abu-Sahlieh: *L'impact de la religion*, p. 88.

² See article 132 of the model of the constitution of the Liberation Party in Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, annex 13.

9) Abrogation in the relationship between the non-regulated interests and other sources

We have seen above that the concept of non-regulated interests (*masalih mursalah*) indicate domains for which there are no norms to be found neither in the Koran nor in the *Sunnah*, or in the consensus, or reasoning by analogy. Nonetheless, it should be observed that some domains regulated by such sources were subjected to a different regulation known as the concept of *masalih mursalah*, understood here in the sense of public interest.

Thus, the Caliph 'Umar (d. 644) suspended the punishment of the amputation of the hand of a thief during the year of famine in spite of the fact that the Koran is formal in this domain: "As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise! (112/5:38).

Similarly, he decided to punish by death a group that kills one person whereas the Koran foresees to kill only one person against another person:

O you who believed! It is prescribed for you retaliation in the killed: free man for free man, slave for slave, female for female (87/2:178).

We prescribed for them therein: life for life (112/5:45).

The solution finds its legitimacy in the Koran (70/16:106) which, whilst demanding of man faith, allows him, in case of threat and serious danger, to say some words or to do something signifying disbelief, to consume forbidden food during famine (112/5:3) and to amputate the hand in the case of theft in order to safeguard people's goods.

Nevertheless, recourse to the concept of non-regulated interests cannot be done without restrictions. Thus, Al-Ghazali (d. 1111) and others demand that the interest to be safeguarded be necessary, general, certain or subject to a higher probability. He gives the example of the enemy who takes as human shield Muslims in order to prevent a Muslim army from attacking them. The Koran forbids the killing of the innocent. But in the present case, it would be allowed to attack the enemy even if such an attack would result in the death of innocent Muslims used as the shield. Two interests confront one another here: personal interest and public interest. In both cases, the Muslims taken hostage get killed, they might as well be killed and thus prevent the enemy from killing other Muslims.

One can also have recourse to *masalih mursalah* in order to establish a special rule with regard to a general Koranic norm. Thus, it is allowed for a noble woman not to breastfeed its baby and to give it to a child-minder, contrary to verse 87/2:233 which foresees breast-feeding by the mothers. Similarly, the testimony of children is allowed in case of injury during their disputes, contrary to verse 87/2:282 which demands the testimony of two male adults.

Such a conflict between existing norms and general interests does not nullify the norm, but it creates an exception for a particular case in order to avoid, through the application of the norm, greater harm than the interest safeguarded by the norm. It is necessary in any case to impose very strict limits on such exceptions. Thus, in case of famine, it should be allowed for an individual or for a group of people to

encroach on the goods of others in order to escape death, whilst demanding the payment of the equivalent or a replacement where possible. The general rule which demands not to encroach on the goods of others remains intact and is not rejected altogether.

Obviously, the concept can leave the door wide open to side-lining the Koran in favour of some *masalih mursalah*. For this reason, it is considered that the concept cannot intervene when one is faced with a sure and univocal norm (*qat'i al-thubut wal-dalalah*). An example of such a text would be the prohibition of the interests mentioned in verse 87/2:275.¹

However, the Hanbalite jurist, Najm-al-Din Al-Tufi (d. 1316),² went very far in considering the interests as being superior to the Koran, the *Sunnah* and consensus. For him, the legislation has for its principle objective to implement them. He cites in this regard the following verses:

O humans! An exhortation came to you from your Lord, a cure for what is in the chests, guidance and mercy for the believers. Say: "With the favour of God and his mercy, so with that they should exult. That is better than what they gather" (51/10:57-58).

There is life for you in retaliation, o endowed with intelligence! (87/2:179).

He also cites the words of Muhammad: "Injury may not be met by injury." He argues that the norms mentioned in the Koran and the *Sunnah* are contradictory, whereas there is no contradiction in the safeguarding of the interests. For that reason, it is preferable to follow the interests in order to realize the unity required by the Koran: "Seek protection with God's rope all together and do not separate (89/3:103).

Al-Tufi gives the following example of the conflict between the *Sunnah* and the interests, a conflict resolved in favour of the latter. Muhammad said to Ayshah: "Were it not for the recent conversion of your people to Islam, I would have destroyed the Ka'aba and would have rebuilt it on the foundations established by Abraham." Hence, Muhammad preferred to leave the Ka'aba the way it was in the interest of the people.

This concept, not recorded by classic authors, is rejected by contemporary authors who see in it a means to totally dismantle the Islamic juridical system. Such authors consider that there cannot be in the Koran or the *Sunnah*, two elements of divine origin, a norm that would be contrary to the interests of the people.³

¹ See also Part II, chapter VIII.II.3.

² Al-Tufi: *Risalah fi ri'ayat al-maslahah*. A text of Al-Tufi also in Zayd: *Al-maslahah fil-tashri' al-islami wa-Nijm-al-Din Al-Tufi*.

³ For a critique of the theory of Al-Tufi, see Zayd: *Al-maslahah fil-tashri' al-islami wa Nijm al-Din Al-Tufi*; Al-Zuhayli: *Usul*, vol. 2, p. 803-806 and 817-827; Al-Hakim: *Al-usul*, p. 378-386; Al-Yubi: *Maqasid al-shari'ah*, p. 537-559.

10) Determination of the abrogating and the abrogated

Abrogation poses serious problems as to the determination of the abrogating and the abrogated items. Sometimes, abrogation is clearly enounced in certain norms. Thus, verse 88/8:65 says:

If there are among you twenty enduring, they will defeat two hundred; and if there are among you hundred, they will defeat a thousand of those who disbelieved, for they are the people who do not understand.

The verse was abrogated by verse 88/8:66 which says:

Now, God lightened for you as he knew that there is weakness in you. If there are among you hundred enduring, they will defeat two hundred; and if there are among you a thousand, they will defeat two thousand, with God's permission. God is with the enduring.

A hadith says: "I forbade you to visit tombs, henceforth visit them for they remind you of the other life."

Often, however, such an express determination lacks. It is therefore necessary to know the chronological order of the norms. But this is not easy because the Koran is not organized in this order, and sometimes the abrogating verse is found before the abrogated verse. To remedy this inconvenience, it is possible to have recourse to one of the companions of Muhammad. Nonetheless, some Muslim jurists, in times of political trouble, preconized the idea according to which all the verses of tolerance towards non-Muslims were abrogated by the famous *verse of the sword* (113/9:5), independent of their chronological order. This was the case with Ibn-Qayyim Al-Jawziyyah (d. 1351). The verse says:

Once the forbidden months are over, kill the associators wherever you find them. Take them, besiege them and lie in wait for them in every ambush. If they repent, perform the prayer and give the purificating [alms], then let them go their way. God is forgiver, very-merciful.

II. Conciliation of the norms

If the date of two opposed norms is unknown, the jurist can try to conciliate them by applying them to two non-opposed domains. Thus, one can try to see whether one norm is not a general norm and the other a special norm. This corresponds to the Roman adage: *Lex specialis derogat generali*. Muslim jurists do not consider this abrogation but weighing up the norms (*tarjih*). An example of this procedure can be found in the following two verses:

Those of you who die and leave wives behind, they must wait for four months and ten [days]. When they reached their term, there is no blame on you for what they do for themselves according to usage (87/2:234).

For those of your wives who have despaired of menstruation, if you have a doubt, their waiting period shall be three months, and for those who have not yet menstruated. The waiting period of those who are pregnant will be until they deliver their burden (99/65:4).

There is a contradiction between the two verses. According to the first verse, every widow, whether pregnant or not, must observe the period of waiting (*'iddah*) of four months and ten days before being able to remarry. As for the second verse, it fixes the period of waiting at three months for the women who no longer have monthly periods and exempts every pregnant woman, whether widow or divorced, from the period of waiting once she has given birth. The second verse constitutes in this regard a special rule with regard to the first verse.

Another procedure of the conciliation of contradictory norms consists in confronting two contradictory hadiths to the Koran, keeping the hadith that conforms best to the latter. Thus, 'Abd-Allah Ibn-'Umar heard the crying of the women following the death of someone, he demanded the crying stops, citing a hadith of Muhammad according to which: "The dead suffers more than the living." The hadith enters into conflict with other hadiths. Ayshah pointed out then that the Koran says: "and no bearer of a burden can bear the burden of another" (55/6:164). It is also reported of Muhammad a hadith according to which children, notably those of the polytheists, will be punished the day of the Last Judgment. Another hadith says the contrary. The first hadith is rejected in accordance with some Koranic verses: "God does not oppress the weight of an atom" (92/4:40); "Today, no soul will be oppressed in anything. You will only be rewarded for what you did" (41/36:54); "Today, every soul will be rewarded for what it earned. Today, [there will be] no oppression" (60/40:17).

In what concerns hadiths, if two of them are in contradiction, priority is given to the hadith reported by a companion closest to Muhammad over a hadith reported by a distant companion. The piety of the reporter is also taken into account. This is what is called the analysis of the chain of the transmitters (*isnad*) of the hadiths.

One can also proceed by the analysis of the content of the hadith (*matn*). Thus, a norm enounced in an explicit manner is superior to a norm enounced in an implicit manner. Proper or figurative sense is also taken into account.

When norms are a result of analogy, a norm whose cause is explicit is superior to the norm whose cause is implicit. Similarly, a norm representing an important interest is superior to a norm representing an interest of less importance, etc.

If the jurist does not find the criteria which allows him to prefer one norm to another, he can then choose the norm of which he is most assured in his conscience.

III. Texts which cannot be abrogated or conciliated

Abrogation and conciliation of texts cannot be done in an unlimited manner without endangering the whole structure of Islamic law. Thus, Muslim jurists consider that some texts do not fall under such a procedure. These texts are classified into three categories:

1) Texts providing fundamental norms

These texts enounce the obligation of believing in God, in his prophets, in his scriptures and the Last Day. They concern the cult and essential virtues such as filial piety, honesty and fixe the sanctions against offences such as adultery, murder, etc.

2) Definitive texts

Some norms are formulated in a definitive manner which does not allow for attenuation. Thus, the Koran says:

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, and do not ever accept their testimony. Those are the perverse (102/24:4).

The terms *do not ever accept* indicate that the norm will never be abolished. Another example concerns *jihad*. Muhammad says: "*Jihad* will be pursued up to the Last Day." The formulation indicates what has been prescribed up to the end of times.

3) Texts referring to past events

The Koran or the hadiths of Muhammad report historical facts. These facts cannot be the object of abrogation, for that would signify that the reported facts are false. Thus, the Koran says:

As for Tamud, they were destroyed by the [marine] transgression. As for Aad, they were destroyed by a tumultuous and insolent wind that God subjected against them during seven nights and eight cutting days. You could then see the people lying overthrown therein as they were hollow trunks of palm (78/69:5-7).

The presumed truthfulness of Koranic texts prevents any questioning of such historical facts. Taha Husayn (d. 1973) bore the brunt of such an endeavour. Egyptian religious authorities lodged a complaint against his book *Pre-Islamic poetry*, published in 1926, for having treated the story of Abraham and Ishmael narrated by the Koran as a legend without any historical foundation.¹ In so doing, the author "had offended the Muslims by contradicting the Koran," reckoned the authorities. A lot of ink continues to be spilled over this issue still today in the Egyptian religious milieu. Due to the political circumstances of the time, the complaint was classified by the public prosecutor who, while disapproving of Taha, considered that "the author had no intention of insulting the religion and that the phrases that were hurtful for the religion were dictated by the research."² Taha was constrained to reprint his book by changing the title and suppressing the offensive phrases.³

Chapter II. Linguistic interpretation

Having established the sources of law and the hierarchy of the sources according to the rules of abrogation and conciliation, it is necessary to see how to understand the law and how to deduce from it norms governing the situation to which they are applied. To achieve that, it is necessary to make use of linguistic analysis. Muslim jurists dedicate to this question almost a quarter of their works related to the princi-

¹ Husayn: *Fil-shi'r al-jahili*, p. 399.

² *Muhakamat Taha Husayn*.

³ Husayn: *Fil-adab al-jahili*.

ples of law. They use, in this domain, Arabic technical terms (indicated between brackets), which are not accepted by all and whose translation remains approximate. We present in this chapter a quick overview of the material which demonstrates the enormous effort exerted by Muslim jurists to understand sacred scriptures. The chapter is particularly addressed to specialists.

I. Proof of language

Texts of Islamic law are drafted in Arabic. Understanding law demands knowledge of this language. The language is known through three means:

- Recurring transmission: this is a narration reported by a human group that cannot be accused of complicity in lying. Thus, some specific terms are used by people and are known according to the meaning they attribute to them in their discussion: heaven, water, air, etc. Al-Shafi'i (d. 820) speaks of "public knowledge" (*'ilm al-'ammah*).
- Unique narration: the meaning given to certain terms is verified through narration reported by a limited number of people. Al-Shafi'i speaks of "individual knowledge" (*'ilm al-khassah*).
- Rational deduction from transmitted data: The Koran says: "The human is in perdition. Except those who believed, did good deeds, enjoined on each other the truth and enjoined on each other the endurance" (13/103:2-3). The definite article (*the* human) in the first indicates every human, to the exception of those excluded by the second one.

Muslim jurists are divided over the possibility of having recourse to analogy in the comprehension of language. Let us look at the following two Koranic verses:

O you who believed! Wine, gambling, erected stones and [divinatory] arrows are only abomination, work of Satan. Avoid them. Maybe you succeed! (112/5:90).

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise! (112/5:38).

In the first verse, the term *khamr* (wine) is used to indicate an alcoholic drink produced from grapes. Yet, the word etymologically signifies *what veils* (reason). The jurists who admit recourse to analogy consider that the prohibition of the consumption of wine can be extended to every product which affects reason, even if it does not come from grapes, such as dates, apples or other substances. In the second verse, the term *sariq* (thief) indicates the person who steals the goods of another. Jurists who accept recourse to analogy, extend the word to tomb raiders who steal shrouds of the dead (*nabbash*).

Jurists who do not accept recourse to analogy consider that the two verses must be understood in their restrictive sense. Thus, the term wine (*khamr*) designates wine produced from grapes and nothing else and the term thief (*sariq*) singularly designates the one who steals the goods of the other.

II. Etymological meaning and technical meaning

Terms can have two meanings; one etymological and another technical, conventional and in this case a juridical meaning. Thus:

- the term *dabbah* signifies *what crawls on earth*, but it is used by jurists to signify four-legged animals;
- the term *mutakallim* signifies *the one who speaks*, but it is used to designate the theologian;
- the term *faqih* signifies *the one who understands*, but it is used to designate the specialist of Islamic law;
- the term *hajj* signifies to go towards a destination, but it is used to designate the pilgrimage to Makka, respecting the conditions foreseen by Islamic law.

III. Classification of terms according to meaning

1) Specific meaning

A term can have a specific (*khass*) meaning. In that case, it must be understood as such, unless there is a counter-indication. The Koran says:

God will not punish you for frivolity in your oaths, but he will punish you for your binding oaths. The expiation thereof is the feeding of ten paupers, with the average of that wherewith you feed your family, or the clothing of them, or the freeing free a [slave]'s neck. Whoever does not find, [he should] fast for three days (112/5:89).

The numbers 10 and 3 in the verse are specific numbers that cannot be interpreted differently. The same goes for the parts regarding the heirs as mentioned by the Koran.

The Koran says:

They said: "Burn him. Succour your gods, if you will do [anything]." We said: "O fire! Be for Abraham coolness and peace" (73/21:68-69).

The term fire here cannot be interpreted in a metaphorical way as some tried to do.

A specific term can be:

- Absolute (*mutlaq*): a generic term; animal, bird, student, Egyptian.
- Restricted (*muqayyad*): a generic term to which an element is added to specify it: a black animal, a white bird, a young student, an Egyptian Muslim.

The distinction is important for determining the impact of juridical norms. Thus, the Koran says:

Those of you who die and leave wives behind, they must wait for four months and ten [days] (87/2:234)

Here the verse speaks of wives (an indefinite term) who had become widows and who must observe a period of viduity ('*iddah*) before remarrying. It matters less whether the marriage was consummated or not. Elsewhere, the Koran says:

You are forbidden [to take as wives]... stepdaughters in your care - those born of women with whom you have consummated marriage (92/4:23).

In this verse, in order for a woman's daughter to be forbidden being given in marriage to her husband, there must have been a consummated marriage (definite term) with the woman in question.

The Koran says:

If one kills a believer by accident, he shall atone by freeing a believing slave, and paying a compensation to the victim's family (92/4:92).

The verse speaks of accidental homicide (a definite term). One cannot therefore generalize the foreseen sanction to every homicide.

In certain verses, the norm is general, but it can be limited by another verse or by a hadith of Muhammad. Thus, the Koran says:

If he has brothers, then his mother shall have the sixth after [the payment of] a bequest he may have bequeathed or a debt (92/4:11).

Yet, Muhammad forbade bequeathing a legacy of more than a third. The last norm limits the impact of the testament on a Koranic norm.

The problem arises when the two norms governing an act comprise a general term and another one that is determined, without there being the possibility of conciliating them. Thus, Muhammad says one should pay a tithe if one has five camels; but in another narration, he says that one should pay if one has five loose camels. Similarly, Muhammad said that it is necessary to fast for two months in case of breaking the fast during Ramadan; but in another hadith, he said it was necessary in that case to fast for two consecutive months. The solutions diverge depending on the jurists.

The Koran says:

Whoever kills by error a believer must free a believing [slave]'s neck and pay to his family the blood-money, unless they remit [it as] alms. But if [the killed] is a believer belonging to hostile people to you, he must free a believing [slave]'s neck. If he belongs to a people between whom and you there is a commitment, he must pay to his family the blood-money and free a believing [slave]'s neck. Whoever does not find, should fast *two consecutive months* as repentance from God. God was knower, wise (92/4:92).

Elsewhere it says:

God will not punish you for frivolity in your oaths, but he will punish you for your binding oaths. The expiation thereof is the feeding of ten paupers, with the average of that wherewith you feed your family, or the clothing of them, or the freeing free a [slave]'s neck. Whoever does not find, [he should] *fast for three days* (112/5:89).

In the first verse fasting is determined as being two consecutive months, and in the second it is three days without being precise to whether it is three consecutive days or not. It is to be reckoned here that the two verses contain two different sanctions (even if it is a question of fasting) concerned with two different matters. One cannot in this case use the first verse in order to understand that it is a question of a fasting of three consecutive days in the second verse.

In verse 92/4:92 mentioned above it is a question of freeing a believing slave. But elsewhere the Koran says:

Those who assimilate their wives with the maternal back, and thereafter would go back on what they have said, must free a [slave]'s neck before they touch each other. That is of what you are exhorted. God is aware of what you do (105/58:3).

In this verse, it is a question of a slave in general. Jurists differ as to whether in both cases it was necessary that the slave be a believer.

In verse 87/2:282, the Koran prescribes the testimony of two witnesses in matters of sale. In verse 87/2:65, it prescribed the testimony of two honest witnesses in matters of repudiation. It is considered here that in the two cases the witnesses must be honest based on the verse: "O you who believed! If a perverse comes to you with news, inquire lest you harm a people in ignorance and afterward you regret what you did" (106/49:6).

Another example concerns dietary prohibitions. The Koran says:

He has forbidden you carrion, blood, pig's meat (87/2:173).

But elsewhere the Koran says:

Say: "In what was revealed to me, I do not find forbidden, on an eater that he eats, except carrion, flowing blood, pig's meat - for it is an abomination - or what is sacrificed, by perversity, to other than God" (55/6:145).

In the first verse, the prohibition concerns blood in general, and in the second it is a question of shedding blood. Hanafites opt for the latter, considering that draining all the blood from an animal would be asking too much from the Muslims. They cite the verse: "God does not want to lay upon you any hardship" (112/5:6).

2) General ('am) meaning

A term can designate a group without determining the number in an exhaustive manner. This can be under different forms:

- Using the plural form:

God enjoins you concerning your children: The male shall have the equal of the share of two females. If they are more than two females, they shall have two-thirds of what the deceased has left, and if there is one, she shall have the half (92/4:11).

- Using the definite article:

As to *the* thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God (112/5:38).

- Using the indefinite article:

Do not marry the associating women until they believe. A believing maid is better than *an* associating woman, even though she astonishes you (87/2:221).

- Using the relative pronoun:

The month of Ramadan is that in which the Koran was descended as guidance for the humans, and proofs of the guidance and the salvation. *Whoever* of you

witnesses the month, he should fast it! *Whoever* is sick or on a journey, a number of other days (87/2:185).

- Using an indefinite form in a negation or order or conditional:

They did not measure God his rightful measure when they said: "God did not descend anything on *a human*" (55/6:91).

O you who believed! Let not people ridicule *other people* who are maybe better than themselves (106/49:11).

O you who believed! If *a perverse* comes to you with news, inquire lest you harm a people in ignorance and afterward you regret what you did (106/49:6).

- Using "every":

Today, *every* soul will be rewarded for what it earned. Today, [there will be] no oppression. God is speedy in the account (60/40:17).

Jurists agree in considering that general terms designate all the members of the class to which they apply, unless otherwise stated. Thus, when Muhammad died, it was necessary to share his succession among his children in conformity with verse 92/4:11. However, this was not the case because Muhammad said that prophets do not leave behind any legacy and their goods are given out as charity.

The usage of a term with a general meaning can also indicate men as well as women, unless otherwise stated.

Sometimes, the Koran addresses itself to Muhammad. Jurists asked themselves whether these discourses concerned him exclusively or whether it was a question of a general discourse addressed to all. They distinguished three situations:

- If it is clear that the discourse concerns Muhammad alone, it should not be applied to others. That is the case with the privilege for him to marry as many wives as he wanted, according to the following verse:

O Prophet! We permitted to you your wives whom you gave their wages, as well as what your right hand possesses out of the spoils that God has granted you, the daughters of your paternal uncle, the daughters of your paternal aunts, the daughters of your maternal uncle, and the daughters of your maternal aunts who emigrated with you, and [any] believing woman if she gives herself to the Prophet and the Prophet wants to marry her, as a privilege given only to you and not to the believers (90/33:50).

- Sometimes, the context indicates that it is a question of a norm of general application, as in the following verse in relation to repudiation:

O Prophet! When you repudiate wives, repudiate them following their waiting period; and count the waiting period. Fear God your Lord. Do not bring them out of their houses, and neither shall they leave, unless they commit a manifest depravity. Those are God's bounds. Whoever transgresses God's bounds, oppresses himself (99/65:1).

- If the verse does not give any indication, it is considered that it is a question of a general norm:

O Prophet! Fear God and do not obey the disbelievers and the hypocrites. God was knower, wise (90/33:1).

The responses given to the questions are considered to be of a general application, unless proven otherwise. Jurists have established in this regard a juridical rule which says: "One should take into consideration the general character of the response and not the specificity of the cause." For instance, a man said to Muhammad that he was going out at sea and had very little drinking water. If he performed ablution with the water he would die from thirst. Could he perform ablution with the salty sea water? Muhammad answered: "Water of the sea is pure, and its dead are licit." Jurists understood from this response that sea water could be used for ritual ablution, and that its dead fish could be consumed (and yet other dead animals are forbidden by the Koran). The norm applies to all and at all times and not just to the sailors.

Some general forms must be understood as being addressed to a limited number of people as in the following cases:

- Indication of an exception:

Whoever disbelieved in God after his faith [...], except who was forced while his heart is at rest on account of faith. But he who opened the chest to the disbelief, God's anger will fall on them and they will have a great punishment (70/16:106).

- Indication of a condition:

It is a duty to God for humans to make the pilgrimage unto the House, for whoever can find his way there (89/3:97).

And we were not to punish until we send a messenger (50/17:15).

- A contrary custom:

It is he who generated gardens trellised and untrellised, palms, plants with different taste, olives and pomegranates alike and unlike. Eat from its fruits when it fructifies; and give its due the day of its harvest. Do not exceed. He does not love the excessive (55/6:141).

The payment of religious tax here does not concern what the farmer and his family consume.

- The incapables:

A general norm is not applicable to categories of people who are incapacitated bearers of obligation. Thus, the obligation of praying or fasting does not apply to incapacitated people (due to old age or insanity).

3) Multiple (*mushtarak*) meanings

Some terms can bear several meanings. Thus:

- A term can be used by different Arab tribes with different meanings.
- A term can have an etymological meaning and a technical one. Thus, the term *niquah* etymologically signifies sexual intercourse, but technically designates marriage.

- A term can have a proper meaning and a figurative one.
- A term can be used to designate different things. For instance, the term *mawla* signifies as much the slave as the master. The term sacralisation (*ihram*) signifies entering in the forbidden territory of the Ka'aba, or the act of wearing of the pilgrimage garments. The term *'ayn* can signify: the eye, the source of water, a spy or an object.

Jurists asked themselves the question as to whether multiple meanings must be taken into consideration in the application of the norm. Some say that it is not possible that a norm covers all the meanings of a term and, consequently, one should search elsewhere for the determination of the meaning underlying the establishment of a norm. Hence, the Koran says:

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise! (112/5:38).

The Arabic term *yad* (hand) can designate the entire arm, the hand and the forearm, or the hand alone (from the fingers to the wrist), just as it can designate the right or the left hand. Based on the practice of Muhammad, jurists consider that the term *yad* designates only the hand up to the wrist and that it is a question of the right hand.

According to some jurists, a norm can cover the different meanings, unless if there is a contrary indication, on the condition of it being possible to logically take into consideration such meanings. Hence, the Koran says:

O you who believed! Do not kill a game when you are in [pilgrim] garb (112/5:95).

Do not permit the game whereas you are in [pilgrim] garb (112/5:1).

The term sacralisation (*ihram*), as we have said, has two different meanings: penetrating the forbidden territory of the Ka'aba, or wearing the pilgrimage garb. Jurists consider that the prohibition extends to both situations. An example from the Koran:

They ask you a decision about women. Say: God gives you his decision about them and that which is recited to you in the book concerning female orphans to whom you do not give what is prescribed for them while you desire to marry them (*targhabun an tankahuhin*), and concerning the weak among children, and that you should act toward orphans with equity (92/4:127).

The Arabic expression (*targhabun an tankahuhin*) has been translated here as "you desire to marry them." But it can also signify "you are reluctant to marry them." The Koranic norm covers both situations.

If a term found in a religious text has an ordinary etymological meaning and a technical meaning, the technical meaning prevails over the other. Thus, the term *salat* (prayer) etymologically designates invocation, whereas in religious terms, it specifically designates religious practice and it is in this sense that verse 3/73:20 should be understood: "Perform the prayer." Similarly, the term *talaq* etymologically signifies the fact of breaking any link, but in religious terms it signifies the repudiation which breaks the marriage and it is in this sense that verse 87/2:229

should be understood: "Repudiation is [only authorized] twice. Then either retention according to usage, or release in goodness."

IV. Classification of terms according to context

1) Proper (*haqiqi*) meaning and figurative (*majaz*) meaning

A term designates, in the first place, that for which it was created. It can, in this regard, bear an etymological, a technical or a customary meaning. It is called in that case the proper meaning of the term.

A term can also designate another object which is related to the proper meaning. In that case, it is called the figurative meaning. Thus, in verse 53/12:36: "I saw myself [in a vision] pressing wine," the term 'wine' signifies grapes. Similarly in verse 53/12:82: "You may ask the community where we were," the term 'community' designates the inhabitants of the town. Equally, in verse 35/90:13: "It is freeing a neck," the expression signifies freeing a slave.

According to some jurists, for a term containing two meanings, one proper and another figurative, priority in understanding must be given to the proper meaning. Thus, if someone bestows his goods upon his children, that signifies his direct children and not his grand-children even if the term children, in the figurative meaning, embraces grand-children too.

The figurative meaning should, however, be taken into account if it is not logically possible to take into account the proper meaning. Thus, Muhammad asked not to sell one measure in exchange of two measures. In fact that signifies the content of the measure and not the utensil used in measuring.

In some case, it is possible to take into account the proper meaning and the figurative meaning. The Koran says:

O you who believed! When you rise up for prayer, wash your faces and your hands up to the elbows; and wipe your heads and your feet to the ankles. If you were sick or on journey, or one of you came from the closet, or you touched women and could not find water, go to high clean soil, and rub your faces and hands with it (112/5:6).

The expression "touched women" can signify as much simple contact (proper meaning) as sexual relationship (figurative meaning). Muslim jurists consider that the ablution is binding in both cases, but the Hanafites say that ablution is only binding in case of sexual relationships.

2) Direct meaning (*sarih*) and circumlocutional (*kinayah*) meaning

A term can have a direct meaning (*sarih*), be it proper (I sold, I bought, I rented) or figurative (I ate from this tree: that is, I ate fruits of this tree). Thus, a man may say to his wife: "Start your waiting period," or "go back to your parents." The first expression signifies the will of the husband to repudiate his wife because the waiting takes place only in the case of divorce. The second expression also signifies the will to repudiate, but only if such is the intention of the husband or if it is used by the husband after the demand of the wife to repudiate her.

To allow for the application of certain penalties, it is necessary that the language used be direct. What is applied here is the principle: "Avoid penalty in case of doubt." Thus, for the application of the foreseen penalty against defamation of adultery, one cannot punish the one who says to the other: "I am not an adulterer" whilst intending to say indirectly that "the interlocutor is an adulterer." Similarly, the admittance of having committed a crime must be clear and not by circumlocutional terms.

V. Classification of terms according to the degree of clarity of their meaning

There are terms whose meaning is seized without having to have recourse to external elements in order to determine it. They are classified into four categories according to the clarity of their meaning.

1) Terms with an apparent (*dhahir*) meaning

Certain terms have an apparent meaning, but which is not intended at the very beginning. Hence, verse 87/2:275 says:

Those who eat the increase [of the loan] will not stand but as stands whom the touch of Satan struck. That is for they said: "Sale is but like the increase."

However, *God permitted the sale, and forbade the increase.*

The passage in italics says that sale is allowed. This is the apparent meaning. The original aim of the norm was not to issue an opinion on the licitness of commerce, but to distinguish between sale and usury. We cannot base ourselves on this norm in order to render licit any sale. Effectively, other norms forbid for example aleatory sale, the sale of fruits before maturity and the sale of wine.

Verse 92/4:3 says:

If you fear not being equitable to the orphans, marry the women who please you: two, three and four. But if you fear not being just, then only one, or what your right hands possess.

The apparent meaning of the verse allows polygamy, but its first aim is to demand for equitable treatment. The permission to marry an unlimited number of slaves comes along on top of it.

A term with an apparent meaning is as such considered binding, unless other norms limit its impact or abrogate it.

2) Terms with a contextual (*nassi*) meaning

A term can bear a contextual meaning. Thus, taking up again the two examples cited above: in verse 87/2:275, the contextual background indicates that sale is not comparable to usury; and in verse 92/4:3, the contextual meanings indicates the number of women should not go beyond four.

Here also a term having a contextual meaning is as such considered as binding, unless other norms limit its impact or abrogate it.

3) Terms with an explained (*mufassar*) meaning or precise meaning

A term can have an intended meaning according to a context that cannot be subjected to interpretation. Thus, the Koran says:

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them *eighty* lashes (102/24:4).

The number "eighty" determines the number of lashes; it cannot be interpreted differently. The sanction cannot therefore be more or less. Jurists consider that the explained term is considered to be binding unless other norms abrogate it.

The Koran says:

Combat the associators all together, as they combat you all together. Know that God is with the [God-]fearing (113/9:36).

The term "all" (*kaffah*) determines the meaning of the term "polytheists." Consequently, one cannot exempt some polytheist from the fight.

In the last example, the precision is given immediately after. But a term used by the Koran can be made precise by a hadith of Muhammad. Thus, verse 3/73:20 prescribed prayer and religious tax and verse 87/2:275 prescribed the pilgrimage. In order to understand the meaning of those terms and the modalities of accomplishing the duties, one should refer to the *Sunnah*.

4) Terms with a decisive (*muhkam*) meaning

The term *muhkam* etymologically signifies "well done, meticulous, etc." We translate it here by "decisive." It is opposed to the term *mutashabih* (ambiguous, we shall come back to this in the following point). The two terms are taken from verse 89/3:7:

It is he who descended the book on you. Wherein are decisive (*muhkamat*) signs which are the mother of the book and others being ambiguous (*mutashabihat*).

A term or a norm has a decisive meaning when the meaning is clear, flowing from the context and admitting neither interpretation nor abrogation. We provide here some examples:

Your Lord decreed: "You shall not adore except him. [Treat] with kindness the parents (50/17:23).

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, and do not ever accept their testimony. Those are the perverse (102/24:4).

It is not for you to hurt God's messenger, nor to ever marry his wives after him. That would be a great [sin] with God (90/33:53).

Holy war shall continue till the day of resurrection (hadith of Muhammad).

The first verse enounces fundamental prescriptions, decisive ones. The second forbids, in a clear manner, recourse to the testimony of slanderers. The third forbids marrying the wives of Muhammad after his death. As for the hadith, the continuity of holy war is rendered categorical by the precision "till the day of resurrection."

5) Implications for the different categories

The above mentioned classification of norms is not simply theoretical. If one comes across a text containing norms belonging to different categories, norms with a decisive meaning prevail over the norms with unexplained, contextual and appar-

ent meanings; norms with unexplained meaning prevail over norms with a contextual and an apparent meaning; and norms with a contextual meaning prevails over norms with an apparent meaning. For example, marriage is regulated by different norms:

- Permission to marry any woman who is attractive (92/4:3) (apparent meaning).
- Limitation of the marriage to four (92/4:3) (contextual meaning).
- Limitation to one wife should one be afraid to be equitable (92/4:3) (explained meaning).
- Never to marry the wives of Muhammad after him (90/33:53) (decisive meaning).

A norm with a definitive meaning limits the norm with an explained meaning; an explained norm limits the one with a contextual meaning, and the latter limits the one with an apparent meaning.

Another example, the Koran prescribes taking, in matters of repudiation, "two just witnesses" (99/65:2) (without explaining). But elsewhere it says:

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, *and do not ever accept their testimony* (102/24:4).

The last verse forbids having recourse to the testimony of slanderers (decisive meaning). It prevails over the former and limits it.

VI. Classification of terms according to the degree of the obscurity of their meaning (*khafi al-dalalah*)

Certain terms have an obscure meaning, containing a degree of incertitude and necessitating reflection in order to be understood, with the help of external indices. The terms are classified into four categories:

1) Terms with a hidden (*khafi*) meaning

Some terms have a clear meaning, but which can refer to different situations of application. Thus, the term thief (*sariq*) refers normally to the one who robs others of their goods in secret. It is the term used by the Koran in verse 112/5:38:

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise!

Muslim jurists have diverged as to the extension of the term "thief," and, by consequence, the sanction, to the conjurer (*tarrar*) who robs others of their goods while they are awake, or against the tomb raider who robs the shrouds of the dead (*nab-bash*).

A hadith of Muhammad says: "The assassin must not inherit." The term assassin (*qatil*) etymologically designates any person who kills another, be it intentionally or by error, directly or indirectly (by instigation or by an intermediary), illicitly or out of legitimate defence. Some jurists consider that only the one who kills intentionally and illicitly must be deprived of inheriting from the one he killed. Others consider on the contrary that the sanction must be applied to all the cases, including manslaughter.

One also comes across a term whose meaning is clear in the verse, but which when used in another can render itself subject to interpretations. Thus, the Koran says:

When they commit depravity, they say: "We found our fathers on it and God commanded it to us." Say: "God does not command depravity. Do you say about God what you do not know?" (7:28).

And yet, the Koran says elsewhere:

When we want to destroy a city, we command its opulent ones, then they commit perversity therein. So the word against it proves true, and we destroy it completely (50/17:16).

In the last verse, does God order evil? How can one conciliate the two contradictory verses? Some have proposed to read the term *amarna* (we ordered) as *ammarna* (we have put into power), a variation found in some Muslim sources.

Elsewhere the Koran says:

If goodness comes to them, they say: "It is from God." If evil afflicts them, they say: "It is from you." Say: "All is from God" (92/4:78).

But the subsequent verse says:

Whatever goodness comes to you is from God, and whatever evil afflicts you is from yourself (92/4:79).

Jurists try, through the effort of interpretation, to resolve the contradiction between the two texts.

2) Terms with an equivocal (*mushkil*) meaning

Some terms can have two or more meanings, and in order to understand them one has to make an effort of interpretation. Which is the case for the Arabic term *quru'* in the following verse:

Repudiated women shall wait for three menstruations (87/2:228).

The term *quru'*, which linguistically signifies a period, can signify as much the purification (*tuhr*) as menstruation (*hayd*). The question is to know which of the two meanings corresponds to the meaning in the verse, and therefore if the divorced must wait three periods of purity (the period that separates two consecutive menstruations) before remarrying or if she must wait until after having had three menstruations. The double meaning gave rise to two different interpretations.

An example from positive law, article 8 of the Iraqi code of personal status says: "The matrimonial coming of age is over 18 years of age." The term "year" can signify as much the solar year as the lunar year. And yet, matters of personal status are governed by Islamic law, and it is therefore the lunar year, as followed by the Muslims, which is designated here.

3) Terms with a succinct (*mujmal*) meaning

It is a question of terms which do not inherently indicate their content. Hence, terms like prayer (*salat*), fasting (*sawm*), usury (*riba*), pilgrimage (*hajj*), blood price (*diyyah*) can only be understood if one knows the institution they represent.

One has therefore to have recourse to explanations drawn from texts other than those that mention them.

Jurists also give as example of the terms with a rare succinct sense Koranic terms or those with unknown meaning, but which at times are followed by an explanation:

The human has been created anxious. When evil touches him, he is afflicted. And when good touches him, he is prevented (79/70:19-21).

The cataclysm! What is the cataclysm? What do you know about the cataclysm? It is the day whereon the humans will be as scattered butterflies, and the mountains will be as the carded wool (30/101:1-5).

A norm comprising a succinct term can have any application only if it is explicated by other passages or indices.

4) Terms with an ambiguous (*mutashabih*) meaning

We pointed out in the previous point (V) that this term has been drawn from verse 89/3:7 and it is opposed to the term *muhkam*.

A term of common usage is considered ambiguous when its true meaning remains misunderstood, in spite of the effort of interpretation. Such is the case for morphological terms used by the Koran when speaking about God:

Those who swear allegiance to you do but swear allegiance to God, God's hand above their hands (111/48:10).

It was revealed to Noah: "None of your people will believe except those who have already believed. Do not be distressed for what they were doing. Make the felucca under our eyes and according to our revelation." (52/11:36-37).

Your Lord is God, who created the heavens and the earth in six days. Then he settled on the throne (39/7:54).

Would God resemble human beings, with hands, eyes and sitting on the throne? Some letters found at the beginning of the chapters which we spoke about above¹ are also considered ambiguous.

Several attempts have been made to understand these terms and these letters, but they are only suppositions and it was considered preferable not to dwell on them too much, their true meaning being a mystery belonging to God alone. Jurists point out in this respect that ambiguous terms are found in non-normative passages and therefore are not binding for anybody and do not bear any obligation. We refer the reader to what we said above.²

VII. Classification of terms according to their scope

Muslim jurists have analysed the structure of sacred texts which serve as sources of Islamic law in order to better seize their meaning. One of such analyses consists in scrutinizing the intention of the speaker through his use of the terms. Schools diverge in this classification. We give here that of the Hanafites who are the majority of the Sunni Muslims. They distinguish four levels:

¹ See Part II, chapter I.I.3.C.

² See Part II, chapter I.III.5.

1) Literal, explicit meaning (*dalil al-'ibarah*)

A term has a primary meaning, intended by the speaker, which is understood upon the first reading. The Koran says:

Those who eat the increase [of the loan] will not stand but as stands whom the touch of Satan struck. That is for they said: "Sale is but like the increase." However, God permitted the sale, and forbade the increase (87/2:275).

This verse contains two norms: the first concerns usury and the other sale. The first objective of the verse is to declare that usury is forbidden and it cannot be compared to a sale that is licit. The verse, however, does not aim at rendering licit every kind of sale. In fact sale is at times illicit, as when it involves wine or pork.

2) Implicit meaning (*dalil al-isharah*)

Besides the literal meaning, the interlocutor can discover a second meaning, an implicit one, deduced from the first. Thus, the Koran says:

We have enjoined upon the human goodness to his parents. His mother carried him reluctantly and brought him forth reluctantly, and the bearing of him and *the weaning of him was thirty months* (66/46:15).

We have enjoined upon the human [goodness] to his parents. His mother carried him in feebleness on feebleness and *his weaning is in two years* (57/31:14).

The explicit meaning of the first verse is that gestation and weaning last 30 months and that of the second is that weaning lasts 24 months (two years). Jurists have deduced from these two verses that the minimum period of gestation is six months. This is the implicit meaning of the two verses when they are placed one after the other.

The Koran says:

Mothers may suckle their children for two whole years, for he who wishes to complete the suckling. On him to whom the child is born, are their provision and clothing according to usage (87/2:233).

The meaning of the verse is to impose on the father the providing of food and the clothing of the mothers of their children. Jurists have deduced from this that the father is the only one to assume the charge of his children.

3) Symbolical meaning (*dalil al-nas*)

Behind the discourse, the speaker intends to put a message across which goes beyond the terms he uses. Thus, the Koran says:

Your Lord decreed: "You shall not adore except him. [Treat] with kindness the parents. Should one of them, or both, attain to old age with you, do not say "fie" unto them nor repulse them, but say to them honourable words (50/17:23).

The verse prescribes respect for the parents to whom one has no right to say "fie." Nor does one have the right to hit them or to humiliate them.

The Koran says:

Those who eat the wealth of the orphans oppressively, they eat but fire into their bellies. They will roast in a blaze (92/4:10).

The verse prescribes not to devour the goods of the orphans and thereby not to dispose of one's goods or to destroy them. The norm signifies that it is necessary to manage correctly one's goods.

4) Contextual meaning (*dalil al-muqtada*)

Some terms cannot be understood in themselves and must be interpreted according to their context, by unveiling the allusions. This is often due to a terse style, considered to be a sign of eloquence in Arabic. Thus, the Koran says:

You are forbidden [to take as wives] your mothers, daughters, sisters, paternal and maternal aunts, daughters of brothers and daughters of sisters, your milk-mothers and milk-sisters, your wives' mothers, stepdaughters in your care... (92/4:23).

You are forbidden carrion, blood, pig's meat, what is sacrificed to other than God, the strangled (112/5:3).

In the first verse, the prohibition is concerned with marriage. The verse must be understood as follows: "You are prohibited from *marrying* your mothers" In the second, the prohibition concerns consumption. It must be understood as follows: "You are prohibited from eating animals that die of themselves, blood, etc."

In the last example, it was asked whether the prohibition could not be understood in an even wider sense, covering not only the consumption of meat, but also every usage of products derived from it. Thus, some jurists forbid as much the meat as the skin or the fur of animals that have died of themselves as well as pork.

5) The conflict between the different meanings

It can happen that some norms bear different meanings. It is up to the jurists to find the most appropriate meaning in order to conciliate them. Thus, the Koran says:

Whoever kills by error a believer must free a believing [slave]'s neck and pay to his family the blood-money (92/4:92).

But the subsequent verse says:

Whoever kills a believer deliberately, his reward will be gehenna. He will be therein eternally (92/4:93).

According to the explicit meaning of the two verses, anyone who commits homicide by accident is punished here on earth, whereas everyone who commits homicide on purpose will only be punished in the other life. But Muslim jurists say that the implicit meaning of verse 92/4:93 prevails over the explicit meaning. The implicit meaning is that everyone who commits homicide on purpose cannot clear his name through the previous sanction since his punishment is eternal damnation. Against the latter the Koran effectively prescribes the law of retaliation (87/2:178; 112/5:44; 50/17:33). But Al-Shafi'i (d. 820) considers that the sanction mentioned in verse 92/4:92 applies all the more so to everyone who kills intentionally.

VIII. Classification of imperative forms

Muslim jurists dwell at length on the meaning of imperative forms of Islamic norms.

1) Positive imperative form

A positive imperative form (do! or other forms of injunction) in principle signify an order, unless the context or the indices show the contrary. As such, it may signify:

- An obligatory order: "*Perform* the prayer, *give* the purificating [alms], and *kneel* with those who kneel" (87/2:43).
- An incitation: "As for those who are unable to marry, let them live in continence until God enriches them from his favour. If those whom your right hands possess seek a writing [of emancipation], *write* it for them if you know any good in them" (102/24:33).
- An advice: "O you who believed! When you contract a debt until a named term, then write it down. Let a scribe write it down between you with justice... Call two witnesses to bear witness from among your men. If there are not two men, then a man and two women, with whom you are pleased as witnesses, so that if one of the two women should forget then the one can remind the other" (87/2:282).
- A permission: "O you who believed! Do not permit [the profanation] of God's rituals, nor the forbidden months, nor sacrificial animals, nor the garlands, nor those who head to the forbidden House, seeking their Lord's favour and pleasure. Once you took off the [pilgrim] garb, you *may hunt*" (112/5:2). The form *may hunt* is not an order, but permission."
- A threat: "Those who distort our signs are not hidden from us. Who is better someone who will be thrown into the fire or someone who will come secure on the day of resurrection? *Do whatever you wish*. He is seer of what you do" (61/41:40).
- A challenge: "If you are in suspicion about what we descended to our servant, *bring a similar chapter and call your witnesses* besides God, if you were truthful" (87/2:23).

When an order is linked to a time limit, it is violated if it is not executed within the time limit. That is the case with the five prayers of each day or the fasting of Ramadan. If, on the contrary, there is no determined time limit, one is expected to execute the order as soon as possible and make the most of the time at one's disposal, because no one has the guarantee of the remaining time of his life. The Koran says with regard to this: "Hasten to forgiveness from your Lord" (89/3:133). "So race each other to the good" (87/2:148). Similarly, in matters of pilgrimage, the Koran says: "It is a duty to God for humans to make the pilgrimage unto the House, for whoever can find his way there" (89/3:97). Every Muslim who can afford to do so must observe the pilgrimage, at least once in his life, as quickly as possible. Observing the pilgrimage several times is neither excluded nor obligatory. But contemporary jurists insist that if one has the means to do so it is better to help the poor than to spend money on re-doing the pilgrimage.

Unless otherwise indicated, an order is supposed to be executed at least once. If the order is linked to a cause, the execution must be reiterated each time the cause is

realized, except when impossible. Hence, the Koran says: "O you who believed! When you rise up for prayer, wash your faces and your hands up to the elbows" (112/5:6). Here, one has to perform the ablutions at every moment of the prayer. The Koran prescribes cutting the hand in case of stealing. But once the second hand has been cut for the second stealing there is no more second hand to cut.

The order to execute an act also implies the execution of the preparations of the act. Thus, the duty to perform the pilgrimage implies the journey to Makka. Similarly, the duty to perform community prayer implies rendering oneself to the mosque. Hence the juridical adage: "That without which a duty cannot be executed is a duty." Yet, sometimes an order expressly indicates the execution of preparatives, as is the case in the ablutions before prayer. Nonetheless, if the preparatives do not depend on the person, he is not obliged to perform them. Thus, a Muslim is bound to participate in communal prayer, but that demands the presence of a determined number of people. If the number is not attained one is not bound to assemble the missing number.

2) Negative imperative form

The negative imperative form (do not do that! or other modes of the prohibition injunction) in principle signifies prohibition, unless the context or the indices indicate the contrary. As such, it may signify:

- A prohibition: "*Do not marry* the associating women until they believe" (87/2:221).
- A repugnance: "O you who believed! *Do not forbid* the good [things] that God permitted you, and do not transgress. God does not love the transgressors!" (112/5:87).
- An advice: "O you who believed! Do not ask about things that if they are shown to you would harm you" (112/5:101).
- A rule of etiquette: "Do not donate so that you have the multiple" (4/74:6).

IX. Juridical rules related to form

Muslim jurists have established three rules concerning the juridical discourse:

1) A word should be construed as having some meaning, rather than disregarded

This rule is expressed in article number 60 of the *Majallah*. It is considered that the one who enounces a discourse aims at transmitting to his interlocutor a meaning. Yet, if one accepts that sometimes people talk for the sake of talking, *a fortiori*, one should accept that in general every discourse has meaning. Therefore, one should endeavour to find the meaning of the discourse instead of emptying it of every meaning. By way of example, if a man creates a foundation for the benefit of his children, but the very man does not have children any more, if not grandchildren, it would be considered that the man intended to designate the latter in order not to have to undo the contract for want of beneficiaries.

2) Priority of the creation of a new situation over emphasis

The repetition of a term or the use of different terms with similar meanings can signify that the person wants to enounce another idea or that he wants to emphasize the same idea. Muslim jurists consider that it is necessary in that case to opt for the first solution. Thus, the Koran says:

That no laden [soul] will be laden with the load of others, that to the human reverts only [the fruit of] *his* endeavour (23/53:38-39).

Some jurists consider that the possessive pronoun *his* refers to sins; it is therefore a question of a repetition aiming at reinforcing the idea of individual responsibility. Consequently, this text should be understood as follows: "That no laden [soul] will be laden with the load of others, that to the human reverts only [the fruit of] *his* sin." Others consider that it is preferable to interpret the pronoun *his* as a new idea. The verse is therefore supposed to be understood as follows: "That no laden [soul] will be laden with the load of others, that to the human reverts only [the fruit of] *his own works*."

If a man says to his wife: "You have been repudiated, you have been repudiated, you have been repudiated," the situation should be understood as signifying a triple repudiation, thus fulfilling the condition of the validity of the definitive repudiation. By consequence, he would only be able to take her back if he contracts a new marriage involving the consent of the wife. If, on the contrary he only wanted to emphasize on his will to repudiate his wife, then the repudiation would not be definitive and he could take her back before the end of her legal waiting period (*'id-dah*), without contracting a new marriage and without her consent.

3) No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is a necessity for speech

This rule is expressed in article 67 of the *Majallah*. It signifies that in principle silence cannot be interpreted as assent unless it is accompanied by indices from which meaning can be deduced. Such exceptional cases are classified into four categories:

A) Silence accompanying an indicative norm

The Koran says:

If he has no child and his two parents inherit him, then his mother shall have the third (92/4:11).

The verse determines the share of the mother (one third), but not that of the father. Muslim jurists deduce from this that the remaining two thirds go to the father.

B) Silence when it would have been necessary to say the contrary

If one keeps silent about a matter, that may imply that had he wished for the contrary he would have expressed it. We give some examples:

During the time of Muhammad, they did not use to pay legal tax for the vegetables grown around Medina for domestic consumption and they used to eat the *dab* (a kind of lizard). Jurists interpreted the silence of Muhammad concerning the two practices as acquiescence.

If a young virgin girl is asked for her accord in a marriage and keeps silent, it is to be considered in this case that her silence is equivalent to consent.

Supporters of female circumcision say that if Muhammad was against the practice, which was present in his time, he would have condemned it. Yet, according to a hadith attributed to Muhammad, he taught a female circumciser how to circumcise saying: "Cut only a bit and do not exaggerate." The opponents retort that the custom was already enshrined in the society of Muhammad and that, not being able to eradicate it completely, he limited himself to alleviating it, in the hope that it would one day disappear.¹

During the time of Muhammad there were slaves. Should one deduce from the absence of condemnation of the practice by the Koran or by Muhammad as a legitimization? Current Muslim jurists say that Muhammad could not abolish slavery definitely, but he foresaw a mechanism aiming at reducing the number of slaves and their liberation. But in spite of the abolition of slavery in Muslim countries, one finds supporters of the practice even nowadays. That is the case of Al-Mawdudi (d. 1979), the great Pakistani scholar, who, responding to an author denying the existence of slavery in Islam, says: "Is the honourable author capable of indicating one single Koranic norm which has suppressed slavery in an absolute manner for the future? The answer is, without doubt, no."²

C) Silence over matters related to the rights of others

A master sees a minor under his guardianship proceeding with a transaction and does not stop him. The master is to be considered sanctioning the transaction by his silence, otherwise it should be said that he sought to mislead the other by invoking the young age of the author of the transaction once the sale was accomplished. A father who sees his under-aged son destroying the goods of the neighbour and does not stop him, can be presumed to have condoned his son's act, consequently, he is answerable for the damage caused by his son. If a neighbour who is beneficiary of the right of pre-emption says nothing during the sale, his silence signifies that he agrees to forego his right.

D) Silence in customary expressions

In some expressions there is recourse to pithy formulas which one needs to interpret according to the sense known through usage. Thus, if someone says: "I bought it at one thousand and one dinars," that means he bought it at one thousand dinars and one dinar.

¹ See Aldeeb Abu-Sahlieh: *Circumcision*, p. 156-157.

² Al-Mawdudi: *Al-Islam fi muwajahat al-tahaddiyat*, p. 64. Al-Mawdudi dedicated pages 63 to 109 to the question of slavery and sexual relations with the captives.

Chapter III. Objectives of Islamic law

I. Importance of the objectives

We have seen above the linguistic rules which serve to seize the impact of juridical norms and to interpret them. Besides the linguistic interpretation, there exists the theological interpretation (or interpretation according to *ratio legis*) which consists in determining the meaning of a disposition based on the goal pursued and the interest to be protected. It is thought in fact that norms were not created arbitrarily, and that behind the norms lies the supreme objective willed by the Legislator, which is the realization of the good of society and the individual.

In modern law, preparatory works and explanatory memoirs are scrutinized in order to discover the reason behind the law. The Muslim jurist has at his disposal collections of the *Sunnah*, biographies of Muhammad, exegeses of the Koran and specific works dedicated to "circumstances of revelation." Furthermore, Muslim jurists have exerted a lot of effort of theorization in order to determine the supreme objectives of Islamic law.

The difference between the Muslim concept and the secular concept of this point is crystallized around the idea that *ratio legis* (reason of the law) in positive law is determined by the human legislator, whereas in Islamic law it is established by the divine legislator. Whilst the human legislator is always bound to motivate his norms, the divine legislator is not, or, at least, his logic is not always evident. Some Muslim thinkers reckon that one cannot base oneself on the objectives of the norms due to the fact that God is sovereign in his decisions and is not bound to motivate them. This is the question that we are going to look into in the first place.

II. Objectives of Islamic law; negation and affirmation

According to the Ash'arites, it is futile to try and look for the objectives underlying religious norms. They cite to this effect the Koran which says:

He will not be questioned about what he does, but they will be questioned (73/21:23).

Ash'arites add that if God's acts were motivated by whatever considerations, that would signify that God was aware of those considerations and was bound to take them into account. He would then not be free in his decisions.

They also put forward the argument according to which every person who carries out an act for a particular objective becomes perfect through the realization of that objective. Yet, God is intrinsically perfect and does not depend on anything to be perfect. Therefore, the verses which contain motivations should be interpreted in an allegorical manner or have attached them consequences which would be as a result of the lack of respect of these norms. Maturidites, Hanbalites and Mu'tazilites affirm the existence of objectives behind religious norms. They invoke in the first place the fact that numerous verses clearly indicate the objective that governs them. For example:

We only sent you as a mercy for the world (73/21:107).

Recite what has been revealed to you of the book and perform the prayer. The prayer prohibits depravity and detestable. And the remembrance of God is greater. God knows what you do (85/29:45).

There is life for you in retaliation, o endowed with intelligence! Maybe you fear [God]! (87/2:179).

I did not create the djinns and the humans except to adore me (67/51:56).

Permission is given to those who are combated [to combat], for they have been oppressed. God is powerful for their succour (103/22:39).

If one refutes the existence of objectives, that signifies that God acts at random, which would be contrary to what the Koran affirms:

We did not create the heaven, the earth and what is between them as playing. Have we willed to take a distraction, we would have taken it from us, if we were to do (73/21:16-17).

As for the above mentioned verse 73/21:23, it signifies that there exists no power outside God and there is no one stronger than him.

The partisans of the recourse to the objectives of law reject the argument according to which the motivation of the acts reduces the freedom of God, since motivation, in this case, comes from God himself, in accordance to his proper knowledge and it is not dictated by external forces or any natural law that eludes it.

They also reject the argument according to which motivation reduces the perfection of God. By motivating his acts, God does not do it in order to attain perfection. He does not need it and he only acts so out of altruism towards his creation, as a reflection of his profound wisdom and mercy.

They add that negation of the objectives is equivalent to the suppression of the law itself, because the jurist would not be able to deduce norms without having to have recourse to the objectives of law.

III. Classification of interests

Islamic law has for objective (*maqasid*) the safeguarding of interests (*masalih*) which jurists classify into three categories:

1) Indispensable Interests (*masalih daruriyyah*)

Muslim jurists have identified five indispensable interests, without which human life would not unfold soundly and the lack of which would entail disorder, corruption and loss of the Hereafter. By order of priority the interests are:

- 1) Preservation of religion (*din*): Religion is at the top of the list of priorities in Islamic law. In this respect, Islamic law prescribes duties which a Muslim must accomplish: profession of faith (there is no god but God and Muhammad is his messenger), prayers, fasting, compulsory charity, pilgrimage and holy war for the spread of faith. It guarantees religious liberty: "There is no compulsion in religion! The righteousness has been made clear from the error. Whoever disbelieves in the idols and believes in God, has grasped the most trustworthy hand-hold that never breaks" (87/2:256). At the same time it punishes by death

the one who abandons Islam or tries to divert a Muslim from his faith, considering that: "The subversion is more grave than killing" (87/2:191).

- 2) Preservation of life (*nafs*): After religion comes the protection of the human person against attempts on his life and on his physical integrity. Islamic law foresees in this regard severe sanctions against such attempts: the law of retaliation and payment of blood price. It deprives of heritage the heir who made an attempt on the life of the deceased. It also forbids suicide and sanctions it with the loss in the Hereafter.
- 3) Preservation of reason (*'aql*): Human reason must be preserved in order that no person is a danger to himself and to society and does not become dependent of the latter. In this line, Islamic law forbids the consumption of wine and any other narcotics in order that the person preserves his mental capacities.
- 4) Preservation of descendants (*nasl*): Preservation of the descendants is a means for the preservation of the humankind, and the good education of the children within the family contributes to the creation of social networks among people. For this reason, Islamic law regulates marriage and protects it, forbids adultery and slanderous accusations of adultery. Consequently, it severely punishes the two infractions.
- 5) Preservation of property (*mal*): In this line, Islamic law regulates transactions aiming at acquiring property, foresees the cutting off of the hand of the thief in order to protect private property, prescribes damages in favour of the victim, and imposes judicial prohibition of irresponsible and ill-considered people in order that they do not squander their goods. It sees to the sharing of goods, forbids monopolizing of consumer products and condemns the exploitation of others through usury.

2) Necessary interests (*masalih hajiyyah*)

They are interests which human beings need in order to have an easy and comfortable life and to help them to face their responsibilities and the difficulties of life. In order to preserve these interests, Islamic law regulates the contracts of sale and of bail, exempts the traveller and the sick from the duty of fasting during the month of Ramadan, allows hunting, bars the door against temptations which can lead to debauchery by forbidding men from intermingling with women and from embracing them, by prescribing the wearing of the veil.

3) Interests for improvement (*masalih tahsiniyyah*)

Islamic law foresees norms whose objective is to give man the most acceptable attitude and to facilitate for him the realization of indispensable interests. Thus, in the domain of cult, it prescribes, for the performance of prayer, to wear clean robes and to choose a clean place. In the relationships among human beings it prescribes having a good character, respect of etiquette, avoiding insulting the other, being discrete, avoiding unnecessary expenses, not cheating the other, giving alms to the beggars. In case of holy war, it forbids the killing of monks, women and children. In order to ensure the protection of religion, it forbids those who are not competent from consulting the sacred books of others. In order to ensure the protection of

reason, it forbids the selling of wine in Muslim milieus even if the sellers and the buyers are non-Muslims. We are therefore in front of norms which complete norms related to the indispensable and necessary interests.

4) Hierarchy of interests

The above mentioned interests are classified by order of priority. One has to start with assuming the respect of indispensable interests before the necessary interests, and the latter before the interests for improvement. By way of example:

- Preservation of religion comes before preservation of life. Thus, one cannot invoke the prohibition of killing or of committing suicide in order not to participate in the holy war or not to kill an apostate.
- Preservation of life comes before preservation of reason. Thus, if thirst endangers life, it is allowed to drink wine.
- Preservation of life comes before preservation of goods. In this line, if a person is hungry and runs the danger of dying, he has the right to steal the goods of others, intending to subsequently compensate the owner, if he has the means.
- Preservation of life comes before the respect of norms in relationship to descendants. Thus, if a woman is sick, it is allowed for a male doctor to treat her, should there not be a female doctor.
- Preservation of the life of another person comes before prayer. Thus, if someone is about to drown one should abandon the prayer of the hour in order to go and save him. Similarly, it is forbidden for soldiers during war and expectant mothers to fast.
- In order to perform prayer, the Muslim must face Makka. Nonetheless, if he does not know the direction of Makka, that should not be an excuse for not performing prayer. The basic obligation of performing prayer comes before the observation of the complementary norm.

IV. Norms without apparent objective

Muslim jurists always try to relate religious norms to objectives acceptable by reason; yet, they acknowledge that some norms are derived from God's unilateral will without any apparent objective or one which human reason is incapable of discovering, at least in this life. It is notably the case with "legal quantities" (*al-muqaddarat al-shar'iyyah*), that is, the number of genuflexions during prayer and circumambulations of the Ka'aba during the pilgrimage, the percentage of *zakat*, the number of lashes for the different penalties, the terms fixing the beginning of obligations. Thus, the Koran says:

Whoever of you witnesses the month, he should fast it! (87/2:185).

Perform the prayer from the sun's decline till the darkness of the night (50/17:78).

Human reason in this case is incapable of comprehending the relationship between seeing the new moon and fasting or the relationship between the declining of the sun and prayer; the two cultic acts could be fixed at other moments. Similarly, we do not know why a Muslim must kiss the black stone during the pilgrimage in

Makka, an act that could evoke a polytheistic cult. The Caliph 'Umar (d. 644) used to say that kissing the black stone procures neither good nor evil and therefore is a futile gesture which he would have done away with had he not seen Muhammad do it. One performs a gesture without asking questions. Some Muslim thinkers, on the outer side of the borderline of orthodoxy, did not hesitate to exploit the aberration of certain norms. Thus, seeing a crowd of Muslims circumambulating the Ka'aba, Ibn-al-Muqaffa' (d. 756) said: "None of them deserves the qualification of a human being."¹

If a norm seems incomprehensible to human reason or contradicts it, that is not a reason to abolish it or to modify it. It is possible to cite the case of female circumcision. Those opposed to this practice consider that it is contrary to Muslim norms and question the authenticity of the hadiths of Muhammad on which it is founded. The partisans retort that religious norms cannot contradict and consider reason as fallible or momentarily incapable of comprehending religious norms; however, a day will come one day when reason will discover the profound wisdom underlying female circumcision. One finds the same reasoning among protestant fundamentalists in what concerns biblical norms related to male circumcision. They consider in this regard that the researcher must start from the premise that religious norms, as an emanation of an omniscient God, cannot be misleading and for that reason human science must be utilized to confirm the truthfulness of religious norms and not to verify their truthfulness.²

It should be pointed out here that the determination of the objectives underlying a norm is important in juridical logic. Muslim jurists consider that one cannot have recourse to analogy by utilizing norms whose objective is not perceptible.

The determination of the reason underlying a prohibition does not signify for that matter that in the absence of such a reason the prohibition is void. Thus, the prohibition of eating pork is at times explained by the fact that a hot climate does not allow for the conservation of the meat. Could one then allow its consumption in cold countries? Similarly, circumcision is explained as a means of ensuring hygiene in hot and desert countries with little water for washing. Can one then call for the abandoning of the practice in cold countries where people wash every day? Muslim jurists respond to these two questions negatively. In fact, it is a question of justifications *a posteriori*, having no real impact on the application or non-application of divine orders.

V. Merging advantage and disadvantage in the realization of the objectives of law

The realization of an interest foreseen by the norm entails practically always an advantage and a disadvantage. Thus, feeding oneself in order to safeguard life or to marry in order to not commit adultery entails some disadvantages: the necessity to work in order to sustain one's family and the necessity to provide for the needs of one's wife in order to enjoy her.

¹ Badawi: *Min tarikh al-ilhad fil-islam*, p. 83.

² See Aldeeb Abu-Sahlieh: *Circumcision*, p. 122-126 and 194-195.

Muslim jurists indicate that the divine legislator aims not at the disadvantages, but at the advantages, even though the two are interrelated. The believer must not look at disadvantages as the objective in itself. Thus, Islamic law prescribes prayer in the mosque and performing the pilgrimage to Makka, which require the effort of leaving one's house in order to go to the mosque and to undertake the journey to Makka, respectively. Definitely, the more the road trodden is long and painful, the more the believer has merit, but the believer must not overburden himself by choosing the longest route in order to reach the mosque or Makka. A Muslim must make sure he has descendants in order to expand the Muslim nation, but he should not for that matter be so zealous as to ruin himself completely. It is considered that exaggeration in a duty can harm the accomplishment of another duty: the one who exaggerates in prayer and fasting neglects his duty to sustain his family. The norm is expressed in a famous saying: "God has the right on you, you have the right on yourself and the family has the right on you: give to everyone who has the right his due." A juridical rule says: "Injury is to be repaired." This means that the believer is not bound to fulfil his duties beyond measure to the point of putting himself into difficulty. It is reported in this regard that a Muslim had vowed to fast in full sunshine. Muhammad told him to fast, but not in the sun. The Koran says: "No one should be charged but according to his capacity" (87/2:233); "God does not charge a soul but according to its capacity" (87/2:286). It was pointed out to Muhammad that some of his adepts were fasting endlessly, were keeping vigil the whole night in prayer and were abstaining from marriage. He said: "By God, I fear him more than anyone of you, but I fast and break the fast, I pray and sleep and I marry. He who refuses my manner of acting is not part of my community."

In case one is faced with two disadvantages, one should choose the least of the two. Thus, if your neighbour's chicken swallows your pearl, you can demand that the chicken be killed in order to extract the pearl, but you must at the same time compensate the owner of the chicken. Hence the juridical rule: "The lesser of evils is preferred" (*Majallah*, article 29).

If the accomplishment of a duty leads to what is prohibited, it is preferable to renounce the duty. From this perspective, it is a duty for a Muslim to pray in the mosque on Friday. However, if the mosque was constructed by a sectarian group aiming at dividing the community, then it is necessary to renounce praying in that mosque. One finds this example in the Koran:

Those who took a sanctuary for [working] mischief and disbelief, as well as disunion among the believers and an ambush to him who made war against God and his messenger before, [...]. They will swear: "We only wanted goodness!" God witnesses that they are liars! Never stand in it (113/9:107-108).

Similarly, if a person doubts whether the woman is his or another's, he must abstain from approaching her. The Koran says: "If you fear not being equitable to the orphans, marry the women who please you: two, three and four. But if you fear not being just, then only one, or what your right hands possess. This is more proper to not oppress" (92/4:3). The rule in this domain is enounced as follows: "Repelling an evil is preferable to securing benefit" (*Majallah*, article 30).

If one is faced with a private disadvantage and another disadvantage concerning the community, Muslim jurists say it is necessary to bear responsibility over the private disadvantage. This is the reason for which harm is carried out against the offender in order to safeguard the interests of the community; it is allowed to use Muslim soldiers as projectiles against the enemy if that can save the community; food monopolized by one person is sold by force in order to feed the community; the black smith is forbidden to have his shop among other shops for fear they catch fire. Hence the juridical law: "A private injury is tolerated in order to ward off a public injury" (*Majallah*, article 26).

VI. Intention in the realization of the objectives of law

In his acts the believer must keep in mind the will to accomplish the objectives set by the Legislator. In this way, he who prays must have the intention to fulfil his religious duty so as to elevate his spirit, to distance himself from vices and to receive recompense in the Hereafter. Nevertheless, he can also perform his prayers because it is a question of a divine order, without being concerned about the other objectives. In that case, he behaves like a patient who, trusting the doctor, follows the prescription without knowing the components of the medicine. In spite of this ignorance, he can be healed. The contrary is the case for him who prays out of hypocrisy in order to be seen, or under constraint. His prayer is worthless. It is considered that such a person makes fun of religious norms by using an objective other than the one for which they were established, an attitude condemned by the Koran: "Do not take God's signs for a mockery" (87/2:231). A juridical rule says in this regard: "No recompense if not for the intention."

Nonetheless, the intention is not necessary in order for the acts to be valid and to have the juridical impact. In fact, Muslim norms have religious and temporal objectives: guaranteeing the salvation of the soul in the Hereafter and ensuring good conduct for the life here on earth. Thus, Islamic law prescribes prayer, fasting during Ramadan and forbids abandoning religion or stealing. The State must see to it that norms are respected. If a person prays or fasts out of fear of the authorities, one cannot reproach him for not conforming himself to the religious objectives of prayer. If the apostate declares his repentance out of fear of being killed, his repentance should not be taken into account without first scrutinizing his sincerity. If a thief gives back the stolen object, it should not be asked whether he is doing it out of fear or out of repentance. On the religious level, a thief has merit only if he acts out of respect for the religious norms and as a sign of repentance. On the juridical level, what counts is the fact of giving back the stolen object to its owner. Even so, it is reckoned that the formal accomplishment of obligations entails in itself non-negligible interests: by opening the door to repentance, by pushing people towards good, by forbidding the disobedience of orders and by tempering the temerity to commit offences.

Intention can have a juridical impact: if someone throws a spear towards a lion in order to save a man being chased by the lion and if the spear misses the target and kills the man, the thrower of the arrow cannot be considered guilty of killing the man, because his intention was good. On the contrary, if he throws the spear to-

wards a man in order to kill him, but hits the lion chasing the man, the thrower of the spear should be condemned although his gesture ended up being beneficial for the man he wanted to kill. If someone crushes grapes in order to make wine, he commits an illicit act. He who sells a firearm to someone who has the intention of killing an innocent person, commits an illicit act. The juridical rule says in this regard: "Matters are determined according to intention" (*Majallah*, article 2). The rule comes from a hadith of Muhammad which says: "Acts depend on the intention, and every person is rewarded according to his intention."

There exist situations where the term is used without intending its meaning. A juridical rule enounces that: "In contracts effect is given to intention and meaning and not words and forms" (*Majallah*, article 3). Four situations are distinguished:

- 1) Someone pronounces a word, but without having the intention of pronouncing it, being in the state of sleep, fainting fit or intoxication. He can also have the intention to pronounce the word, but without having the intention of the meaning, being ignorant of it (a child, repeating a word without understanding it, reading or dictating a text understanding it yet without approving of it). In that case, words without intention are not taken into account. Nonetheless, some jurists reckon that it is necessary to take into account words of a drunken man in a guilty manner in order to punish him and force him not to reoffend.
- 2) Someone can have the intention of pronouncing a word whilst understanding it but pretend to adhere to it, jokingly. Jurists distinguish three situations:
 - Joking in matters of cult: if someone apostatizes as a joke, he is treated as such and punished for apostasy. The non-Muslim who does the profession of faith jokingly is considered to have acted seriously and his profession is valuable in the eyes of law. The Koran says:
If you ask them, they will say: "We were only discoursing and playing." Say: "Is it God, his signs and his messenger that you were mocking?" Do not apologize: you disbelieved after having believed. If we forgive a group of you, we will punish [another] group for they have been criminals (113/9:65-66).
 - Joking in matters of marriage: Muhammad said:
In three things seriousness is taken to be serious and joking to be serious: marriage, repudiation and the going back on the revocation of the repudiation.
In these particular cases, joking is taken to be serious.
 - Joking in other acts: joking is without effect in matters of sale, leasing, tenant farming, guarantee, security or transfer.
- 3) Someone can have the intention of pronouncing a word whilst understanding it but pretend to adhere to it, out of constraint. The majority of jurists consider that the contract in that case is not valid. Others consider that the contract is valid if the contracting party agrees to it once the constraint is terminated.
- 4) Finally, someone can have the intention of pronouncing a word whilst understanding it but adhere to it. Here, the term is taken into account with all its juridical implications, by giving it its true meaning, unless there are indices that the user intended an allegorical meaning. Thus, if someone says: "I offer you this

book for 20 Euros," we should understand that it is not a question of a gift, but of selling. Some jurists, however, accept the allegorical meaning only if there is no contradiction between the latter and the true meaning. Thus, marriage is valid if one uses the expressions "I give you my daughter in marriage," or "I give her to you," or "I sell her to you," or "I give her to you as alms." On the contrary, it is not valid if one uses the expression "I lend her to you," or "I leave her with you," or "I bequeath her to you."

VII. What entails a duty is binding and what entails a prohibition is prohibited

1) What entails a duty is binding

Legal norms impose duties. To accomplish them it is necessary at times to undertake steps which are not always foreseen by religious law, but which can be deduced from the duty itself.

For example, the Koran prescribes performing one's daily prayers. In order for the prayers to be valid, they have to be preceded by ablutions:

O you who believed! When you rise up for prayer, wash your faces and your hands up to the elbows; and wipe your heads and your feet to the ankles. If you were sick or on journey, or one of you came from the closet, or you touched women and could not find water, go to high clean soil, and rub your faces and hands with it (112/5:6).

The objective of the ablutions is the state of purity. To attain it, Muslim jurists demand that the person be circumcised, considering that the foreskin retains remains of urine and that simple ablution does not suffice to remove them. The demand is not mentioned in the Koran, but it can be deduced from the duty to purify oneself – an argument rejected by those who consider that cleanliness is demanded only in the measure in which it is possible. For the same reason, contemporary authors forbid manicure (cosmetic treatment of the hands and fingernails) for it hinders performing ablution correctly.

The Koran prescribes the pilgrimage to Makka. To do it, one has to undertake the journey and prepare what is required to reach there. This is not foreseen in the Koran, but it can be deduced from the initial duty.

It is forbidden to drink wine. Notwithstanding the prohibition, it is a duty for a person to safeguard his life. If he is in danger of dying because of thirst and that the only drink available is wine, drinking it becomes a duty.

Muslim jurists have formulated a juridical rule which says in this regard: "What entails a duty is binding." This corresponds approximately to the expression "He who wills the end, wills the means." The corollary of the above mentioned rule is: "What entails a prohibition is prohibited."

2) What entails a prohibition is prohibited

Muslim jurists deal with this principle under the title *sad al-dhara'i'* (blocking pretexts). Some consider it to be one of the sources of law, which signifies that it determines what attitude to adopt. According to this principle, it is necessary to forbid

a licit act that risks turning out to be an illicit act. The norm is expressed by the following saying of Muhammad:

What is licit is clear, what is illicit is clear and between the two there exists grey areas which many people ignore. He who avoids the grey areas safeguards his religion and his honour, and he who draws near to them resembles the shepherd grazing his flock around the fire, constantly risking to fall in.

Muslim jurists distinguish four hypotheses:

- 1) If a vicious conduct in its very nature leads to prohibitions, it is prohibited. Thus, adultery in itself is a vicious act and it leads to other prohibitions such as the confusion of family relations and the loss of descendants. In parallel, the drinking of wine is in itself a vicious act and it leads to the loss of reason. These acts are forbidden in themselves and for what they cause.
- 2) If a permitted conduct risks at times leading to a prohibition, it remains permitted. Thus, the traveller is exempt from fasting during the month of Ramadan or from performing his prayers in a regular manner. It is considered here that the journey causes the fatigue that hinders the normal accomplishment of the duty. The exemption is provided for everyone even if, at times, this may concern a person for whom travelling does not cause fatigue, as can be the case for a king travelling in a luxurious manner.

Testimony is required in some cases. Although this can be false, it cannot be completely excluded, but the testimony of one who is not just (*'adl*) can be challenged.

In order to avoid temptation and debauchery, Islamic law prescribes the veil for women. As an exception, it allows a man to see the face of his fiancée, considering that this serves an interest, even if it may lead to debauchery.

- 3) If a permitted conduct leads, with greater probability, to a prohibition, it is forbidden. One such situation is found in the Koran which says:

Do not insult those whom they call, besides God, lest by enmity they insult God, without knowledge (55/6:108).

The Koran abhors the idols of the polytheists. It is therefore allowed to insult them. Yet, such insults risk provoking the anger of the idolaters and push them to insult God in their turn. Consequently, the Koran forbids insulting the idols.

It is allowed to construct mosques, but the construction of mosques on tombs risks transforming them into places of the veneration of the dead. As a result, it is forbidden to build mosques on tombs. It should be pointed out though that the Omayyad Mosque of Damascus contains the tomb of John the Baptist revered by Muslims.

Going on pilgrimage is a duty, but it is forbidden for a woman to go on a pilgrimage if she is not accompanied by a male next of kin in order to protect her honour and to avoid debauchery. In a similar manner, co-education is forbidden in Saudi schools and universities out of the fear that it leads to debauchery. For the same reason, some coaches of the train in Cairo are exclusively reserved for women.

Islamic law prescribes the safeguard of reason. Even if moderate drinking of wine does no harm to reason, it is forbidden out of fear of excessive drinking.

What is the limit? Should vineyards be forbidden because their grapes might be used for making the wine which is forbidden by the Koran? The majority of the jurists respond negatively, because the utility of vineyards prevails over the risk.

- 4) If a conduct is motivated by a bad intention, it is forbidden. The Koran forbids a man who has repudiated his wife in a definitive manner to take her back before her having been married to another man: "If he repudiates her, she is not permitted to him until she marries another husband" (87/2:230). Sometimes, the first husband can connive with another man so that he can marry his ex-wife and repudiate her (without consuming the marriage) so that he can take her back. It is reckoned here that the pretended marriage is illicit from the point of view of religion, even if, on the legal level, no sanction is foreseen in its regard. Islamic law prescribes the annual payment of tax on one's earnings. To avoid this payment, some people make a gift (fictitious) at the end of the year from their earnings, only to take it back afterwards. Here too the act is illicit. We are faced with the phenomenon of shrewdness which we shall discuss later in the chapter VI of this part.

Chapter IV.

The content of the norm

I. Qualification of an act foreseen by a norm

Deducing from the sources of Islamic law, Muslim jurists have classified human acts in five categories.

1) The obligatory act (*wajib*, *fard*)

This is what the Legislator orders to do in a firm manner and without equivocal. He who does not comply is punished here on earth; and he who complies has merit in the Hereafter. He who negates its obligatory character, becomes a disbeliever (*kafir*), and he who abandons it by negligence becomes a sinner (*fasiq*). Among obligatory acts, we cite the following Koranic verses:

O you who believed! It is prescribed for you fasting as it was prescribed for those before you. Maybe you fear [God]! For numbered days (87/2:183-184).

Perform the prayer, give the purifying [alms], and kneel with those who kneel (87/2:43).

Then they should perform their duties, fulfil their vows, and turn around the ancient House (103/22:29).

Fulfil the covenant. The covenant will be asked about (50/17:34).

Obligatory acts are divided into different categories of which we indicate the most important ones:

A) Obligatory acts in relation to their objective

An obligation can be designated (*wajib mu'ayyan*): it is a specific obligation asked of an individual. He can only be exonerated once he has executed it himself. Thus, one is bound to pray or fast and cannot substitute prayer or fasting with another act. The obligation can also provide a choice between different possibilities (*wajib mukhayyar*):

When you meet those who disbelieved, strike the necks. When you have greatly slaughtered, make fast the bonds. Thereafter, either grace or ransom till the war lays down its burdens (95/47:4).

God will not punish you for frivolity in your oaths, but he will punish you for your binding oaths. The expiation thereof is the feeding of ten paupers, with the average of that wherewith you feed your family, or the clothing of them, or the freeing free a [slave]'s neck. Whoever does not find, [he should] fast for three days. This is the expiation of your oaths when you have sworn. Keep your oaths. So God makes manifest his signs to you. Maybe you thank! (112/5:89).

Thus, according to the first verse, the *imam* has the choice between free liberation of the prisoners or against a ransom. According to the second verse, he who falls short of his oath has the choice to feed ten poor people, clothe them or liberate a slave. If he does none of the three, he becomes guilty, but he can cumulate them.

It is, by contrast, forbidden to accumulate certain obligations. Thus, if an *imam* dies, the community must choose another one among the candidates; it cannot choose several.

B) Obligatory acts in relation to its determination

An obligation can be determined (*wajib muhaddad*). Is part of this category the obligation to perform the five prayers according to the prescribed modalities, to pay the tithe or the price of blood according to the amount foreseen by the law and to pay the price of the sale, rentals or debts according to the amount due. When a determined obligation concerns human rights, it can be demanded in justice.

An obligation can be undetermined (*wajib ghayr muhaddad*). Is part of this category the obligation to spend for the cause of God, material solidarity, feeding the poor and helping the needy. This obligation cannot be demanded in a court of justice. In this way, a beggar or the State cannot lodge a complaint against him who does not give alms.

Muslim jurists diverge over the qualification of the alimony in favour of the wife and the next of kin. Some reckon that this is a question of an undetermined obligation due only if the judge orders it, starting from the date of the judgment. Others say, on the contrary, that it is a question of a determined obligation due even during the period preceding the judgment.

As a general rule, the State should be able to claim in justice the dime, but for the States which have fixed taxes, only the latter can be claimed, the payment and the amount of the dime remains the discretion of the believers.

C) Obligatory acts in relation to the concerned

An obligation can be personal (*wajib 'ayni*): it is an act that the legislator demands of an individual, such as performing prayer, abstaining from committing adultery.

Can one delegate to another person an obligation? Muslim jurists distinguish different categories:

- It is not possible to delegate to another person prayer or fasting by the one who is bound, cultic acts being a means to test the person and to reduce his passions.
- Some personal obligations comprise an aspect which is physical and another which is financial. Such is the case for the pilgrimage. If a person is physically and financially capable to go on pilgrimage, he should do it himself. If he is physically handicapped but financially capable, he can pay another person to do the pilgrimage in his stead.
- It is possible to delegate another person for personal obligations that concern the financial aspect. Thus, if someone pays the debt of another person, he frees him of what he owed.

An obligation can be communal (*wajib kifa'a*, obligation of sufficiency): this kind of obligation is imposed on the whole community. If a part of the Muslim community, competent and in sufficient numbers, accomplishes it, the other part is exempt. If otherwise, the whole community becomes sinful: those capable, because they fell short of their duty, and those incapable, for not having encouraged the capable to do it. Examples of communal obligation include: washing the corpse, wrapping it in a shroud and praying over it as well as having a judge, a *mufti* and other qualified people needed by the Muslim community. It is not requested of every Muslim to be a judge, but the community has the duty to see to it that there is one.

A collective obligation can become personal if the person called upon is alone or if he was assigned to do it. Thus, if there is only one doctor in the community or the doctor is with the patient, he is personally obliged to cure him. If a swimmer witnesses the drowning of a man, he is personally obliged to save him. The doctor and the swimmer cannot in that case fold their arms under the pretext that others can intervene.

How can Holy War be qualified? Is it a personal duty in which everyone should participate or a duty of sufficiency, whose obligation concerns only a determined part of the population, notably the army? Al-Azhar considered that Holy War against Americans and the English in Iraq was a personal duty. Every Muslim was supposed to oppose the aggression.

D) Obligatory acts in relation to the time of execution

Some obligations can be executed at any time (*wajib mutlaq*), but preferably as soon as possible, because no one knows his life-span. Such is the case for the vow to fast, expiation following perjury, making up for the days missed – for valid reasons – during the fasting of the month of Ramadan, the pilgrimage which must be done once in a life-time.

Other obligations must be executed within a determined period of time (*wajib mu'qqat* or *muqayyad*): it is the case for the five prayers, fasting during the month of Ramadan and the pilgrimage which must be accomplished, within a period of time fixed by the religious law, unless there is a valid reason. He who performs the prayer before or after the appointed hour, fasts before or after the month of Ramadan, does the pilgrimage before or after the indicated dates, has not done his duty. And if he has fallen short of accomplishing his duties for valid reasons, he must execute them at another moment. Muhammad said in this regard: "He who sleeps without praying or forgets to pray, must do it when he remembers."

E) Obligatory acts in relation to a determined period of time

An obligation can be for a determined period of time that is restrictive (*mudayyaq*). Thus, the obligation to fast during the month of Ramadan covers the whole month of Ramadan. No other fasting should be observed during the same period.

The obligation can also be for a determined period of time that is longer (*muwas-sa*): thus a Muslim is bound to perform prayer at midday, but it is possible to accomplish, besides midday prayer, another obligation since midday prayer does not cover all the time during which midday prayer is performed.

There are also hybrid obligations (*dhu shabhayn*). Thus, one can only go on pilgrimage once a year, but during the same act it is possible to accomplish obligations other than the pilgrimage.

2) The recommended act (*mustahab, mandub, sunnah*)

The recommended act is one that the Legislator recommends or orders without it being categorical. He who accomplishes a recommended act is praised here on earth and recompensed in the Hereafter; he who does not do it is neither blamed for it here on earth nor punished in the Hereafter. An act is considered recommended in relation to the formulation adopted and the context. Thus, in matters of debts, the Koran says:

O you who believed! When you contract a debt until a named term, then write it down... If you are on a journey and cannot find a scribe, then a pledge in hand may suffice. If you confide in each other, he who is confided should deliver the deposit confided to him (87/2:282-283).

From this verse it is clear that it is recommendable to put in writing an acknowledgement of a debt and, for want of a scribe, take a pledge. Nevertheless, this is not obligatory where there is mutual trust between the debtor and the creditor. Similarly, the Koran recommends the freeing of slaves without forcing the hand of the master:

Those among your servants who wish to be freed in order to marry, you shall grant them their wish, once you realize that they are honest. And give them from God's money that he has bestowed upon you (102/24:33).

We can also give, as an example, the exhortation to give alms or to feed the poor. Muslim jurists divide recommended acts into different categories of which we cite the most important:

A) Acts constituting an asserted sunnah (sunnah mu'akkadah)

They concern strongly recommended acts. Some of these are acts which complement religious obligations such as the calling to prayer and communal prayer. The same goes for acts accomplished by Muhammad in an almost regular manner such as gargling during ablutions or reading some passages of the Koran during prayer time. He who neglects any of these obligations will be the object of reproach.

Recommended acts can be obligatory on community level. Thus, it is recommended to call to prayer or to pray together. However, a community cannot totally renounce such acts. Jurists who consider male and female circumcision as a recommended act and an obligatory one, foresee aggression against the community that collectively renounces to do it. Thus, the Shaykh of Al-Azhar, Jad al-Haq (d. 1996), quoting a classic jurist, wrote in a *fatwa*:

If a region ceased, in common accord, practicing male and female circumcision, the Head of State will declare war against it, for circumcision is part of the Islamic rituals and its specificity. Which means that male and female circumcision are obligatory.¹

Marriage is a recommended act for every individual, but an obligation for the community. If everyone renounces to it, that would be harmful for religion.

B) Supplementary acts (sunnah za'idah or nafilah)

Some acts in this category were sometimes accomplished and sometimes neglected by Muhammad. This is the case for the giving of alms to the poor, the Monday fasting, the two genuflexions besides those required. He who imitates Muhammad in these gestures demonstrates his profound attachment to him and acquires some merit in the Hereafter. But if a person does not do them, he will not be reproached since the gestures are not obligatory.

C) Ordinary acts of Muhammad (sunnah 'adiyyah)

These are acts that Muhammad had accomplished by reason of his human nature, such as his manner of eating, drinking, walking or sleeping. Imitating the model of Muhammad in these domains is a praiseworthy act, but he who does not conform to them will not be the object of reproach. The acts demonstrate good conduct and good manners, but they are not necessary in themselves.

Jurists asked themselves the question of knowing whether a person is obliged to pursue a recommended act once he has started it. Hanafites agree. They cite the Koran: "O you who believed! Obey God, obey the messenger, and do not nullify your deeds" (95/47:33). They add that making a vow is not obligatory, but he who does it is held accountable to God. He who starts a good action is like a vow which he must carry out.

3) Forbidden acts (haram, mahdhur)

A forbidden act is punishable here on earth and in the Hereafter, and recompensed in the Hereafter if it is avoided. The prohibition is expressed in different ways in the Koran.

¹ See Aldeeb Abu-Sahlieh: *Khitan*, annex 6.

In an explicit manner:

Prohibited for you (in marriage) are your mothers, your daughters, your sisters, the sisters of your fathers, the sisters of your mothers, the daughters of your brother, the daughters of your sister, your nursing mothers, the girls who nursed from the same woman as you, the mothers of your wives (92/4:23).

Repudiated women shall wait for three menstruations. It is not permitted to them to conceal what God created in their wombs, if they believe in God and the last day (87/2:228).

Prohibition of transgression:

It is permitted to you, the night of the fasting, to have sexual intercourse with your wives [...] Now approach them [...] Eat and drink until the white thread appears to you distinct from the black thread at dawn. Then complete the fasting until the night. But do not approach them while you cleave to the sanctuaries. Those are God's bounds. Do not approach them (87/2:187).

Do not approach fornication. It is a depravity and an evil way! (50/17:32).

By the order of abstinence:

Abstain from the abomination of the idols and abstain from untrue words (103/22:30).

By menace, in case of disobedience:

Those who eat the wealth of the orphans oppressively, they eat but fire into their bellies. They will roast in a blaze (92/4:10).

Those who throw [accusations] on the preserved women and do not bring forth four witnesses, then you shall lash them eighty lashes, and do not ever accept their testimony. Those are the perverse (102/24:4).

Muslim jurists divide forbidden acts into two categories:

A) Acts intrinsically forbidden (al-haram li-dhatih)

An act can be intrinsically forbidden, *ab initio* (*ibtida'an*), without any juridical impact, due to the seriousness of the damaging consequences for the person or for society, like the fact of drinking wine, eating pork, committing adultery, killing someone, etc.

Forbidden acts do not produce the effects that they should normally. Thus, adulterous practices and incestuous marriages do not lead to parental relations or succession rights, and stealing does not make one a lawful owner of the stolen property. If someone kills a next of kin, he cannot inherit from him.

Forbidden acts can be allowed in case of absolute necessity. Thus, should one run the risk of dying from thirst or hunger he can drink wine or eat pork within the limits of avoiding death.

B) Forbidden acts due to an incidental cause (al-haram li-'aridah or li-ghayrih)

An act can be intrinsically licit, but be the object, subsequently, of a prohibition due to an external element. Acts in this category include: prayer in a stolen dress, sale during the call to Friday prayer, marriage with a woman repudiated three times

in order to render her licit for her husband and sales masking the stipulation of interests.

In these acts, jurists have made the licit aspect to prevail over the illicit one, considering that they give rise to imperfect duties and invalidated contracts which are nonetheless not void. Nevertheless, others consider that these acts are illicit and without juridical effect.

Acts forbidden because of an incidental cause are authorized in case of a simple difficulty (and not because of necessity). Thus, a doctor can see the nudity of a woman in order to treat her.

4) Disapproved or reprehensible acts (*makruh*)

An act can be disapproved, reprehensible, inadvisable, detestable, whilst being allowed and not punishable. Not doing it is preferable. He who abstains from it is praised and acquires merit in the Hereafter, and he who does not can be blamed for it. It is therefore the opposite of a recommended act. This qualification is deduced from the formula used by the Koran or the hadiths. Thus, the Koran says:

O you who believed! When the call is made for prayer on Friday, hasten to God's remembrance and leave off the sale. That is better for you. If you were knowing! (110/62:9).

According to this verse, doing commerce during the time of congregational prayer on Friday is a reprehensible act. Performing prayer on the roadside or in the bathroom is also considered shameful. Repudiation falls under this category. Muhammad said: "Repudiation is the most detestable act." Some Arab legislators have punished ill-considered repudiations by imposing compensation in favour of the ill-treated wife, a compensation contested by some jurists due to the fact that it limits a right acknowledged by the Koran to repudiate one's wife.

5) Permitted acts, licit (*mubah, halal, ja'iz*)

They concern every act the Legislator leaves up to man to carry out or not to. Neither recompense nor punishment is attached to these acts. This is derived from Koranic texts which exclude criticism of behaviour:

Today, are permitted to you the good [things]. Is also permitted to you the food of those who were given the book (112/5:5).

There is no blame on the blind, nor is there blame on the lame, nor is there blame on the sick, nor on yourselves that you eat from your houses, or your fathers' houses or your mothers' houses, or your brothers' houses, or your sisters' houses, or your paternal uncles' houses, or your paternal aunts' houses, or your maternal uncles' houses, or your maternal aunts' houses, or what you possess the keys of, or your friends' [houses]. There is no blame on that you eat together or separately (102/24:61).

He has forbidden you carrion, blood, pig's meat and what is sacrificed to other than God. But whoever is forced, and is not rebel nor transgressor, there is no sin upon him. God is forgiver, very-merciful (87/2:173).

Those of you who die and leave wives behind, they must wait for four months and ten [days]. When they reached their term, there is no blame on you for what they do for themselves according to usage (87/2:234).

Or from texts which permit a behaviour:

Are permitted to you the [beasts] of the cattle (112/5:1).

Or from an order signifying permission:

Once you took off the [pilgrim] garb, you may hunt (112/5:2).

When the prayer is finished, then disperse on the earth, seek God's favour, and remember God much. Maybe you succeed! (110/62:10).

Some acts are obligatory in themselves, but they leave a certain margin of freedom in the modality of their accomplishment. Thus, a person is free in the choice of his wife and the moment of the marriage and sexual relations and he is free in the choice of his food and the time to eat it. Yet, it is illicit to renounce these acts in a definitive manner.

6) The classification of the Hanafites

Hanafites divide obligatory (*wajib*) acts into two categories:

- *Fard* obligation: when a prescribed norm derives from a definitive and univocal source (*dalil qat'i al-thubut wal-dalalah*), as is the case for the obligation to perform prayer prescribed by the Koran. The Koran says: Read then of the Koran that which is easy (3/73:20). This means that a Muslim should recite a part of the Koran during prayer. The prayer of him who does not do it is void.
- *Wajib* obligation: when a norm derives from a speculative or equivocal source. Thus, a unique hadith says: "He has not performed prayer who has not recited the first chapter of the Koran." According to the Hanafites, the recitation of the first chapter is not a condition for the validity of prayer. In order for the prayer to be valid it is enough for the person to recite any part of the Koran, as the above-mentioned verse 3/73:20 says.

For the Hanafites, the distinction has juridical consequences: he who denies accomplishing a *fard* act becomes a disbeliever, in contrast to the one who denies the duty of accomplishing a *wajib* act.

Hanafites also divide repulsive (*makruh*) acts into two categories:

- A forbidden reprehensible act (*makruh tahrim*): some unique hadiths (hence uncertain) of Muhammad forbid such acts as asking for the hand of a woman already betrothed to another, or the selling of an object already pledged to another buyer.
- A reprehensible act of preference (*makruh nazahah*): for instance, Muhammad forbids eating horse meat because horses are needed in wars. It is preferable to abstain from eating their meat, but one cannot reproach the one who does so.

7) Al-Shatibi's classification

Al-Shatibi (d. 1388) adds a category between the licit and the illicit, which he calls acts left open-ended, without regulation (*'afuw*). Sometimes they used to ask Mu-

hammad what was supposed to be done, he would answer: '*afuw*': left open to your choice. The Koran says in this regard:

O you who believed! Do not ask about things that if they are shown to you would harm you. If you ask about them, when the Koran is descended, they will be shown to you. God pardoned [you] for them ('*afa Allah 'anha*). God is for-giver, magnanimous (112/5:101).

The Koran goes as far as demanding inquisitive Muslims to give alms before asking questions: O you who believed! When you hold confidence with the messenger, precede your confidence by an alms. "That is better for you and purer" (105/58:12). In the same manner Muhammad said: "The most guilty among the Muslim is he who asks questions about what was not forbidden and became so following his question." To one who asked him whether it was necessary to go on pilgrimage each year, Muhammad responded: "I swear by the one who holds my soul between his hands that if I said yes, the pilgrimage would become an obligation and you would then not accomplish it."

An example of an act left open is given about having sexual intercourse with a woman while ignoring the fact that she was forbidden due to kinship. Once one becomes aware of the relationship of kinship, the act becomes illicit, but an act accomplished during the time when one was ignorant of this cannot be qualified as licit.

8) Circumstances of qualification

An act can be qualified in different ways according to circumstances. Thus, marriage is a confirmed *Sunnah* for a normal person with material capacity to marry and who is confident that he would treat his wife with equity. It is obligatory if a person fears becoming adulterous by remaining a celibate. It is reprehensible if the husband fears iniquity. It is forbidden if the husband is sure of treating his wife unjustly. Similarly, legacy is obligatory if it concerns an obligatory act, recommendable if it concerns a recommended act, forbidden if it concerns a forbidden act, reprehensible if it concerns a reprehensible act and permitted if it concerns a permitted act.

II. Constitutive elements of an act

A norm can establish the constitutive elements of an act. The validity or invalidity of such an act depends on it. Jurists call this *hukm wad'i*: positive norm. The constitutive elements are: the cause, the condition and the absence of hindrance.

1) Cause (*sabab*)

Etymologically, the term *sabab* signifies rope. The Koran says:

He who presumes that God will not succour him in the worldly life and the last [life], should stretch a rope up to the heaven, then cut it, and see whether his plot will remove that which enrages [him] (103/22:15).

It is what binds two objects together. Muslim jurists define the cause as follows:

The evident and constant attribute the Legislator has identified as being an indication or the immediate cause of a judgment such that, if the cause is present, it

renders necessary the application of the judgment and if it is absent, the judgment is not applicable.

They distinguish two categories of causes:

A) Causes independent of the will of the person in charge

The Koran says:

Whoever of you witnesses the month, he should fast it! (87/2:185).

God enjoins you concerning your children: The male shall have the equal of the share of two females. If they are more than two females, they shall have two-thirds of what the deceased has left, and if there is one, she shall have the half. As for his parents, each of them shall have the sixth of what he has left if he has a child. If he has no child and his two parents inherit him, then his mother shall have the third. If he has brothers, then his mother shall have the sixth after [the payment of] a bequest he may have bequeathed or a debt (92/4:11).

He has forbidden you carrion, blood, pig's meat and what is sacrificed to other than God. But whoever is forced, and is not rebel nor transgressor, there is no sin upon him. God is forgiver, very-merciful (87/2:173).

According to the first verse the appearance of the moon indicates the beginning of the month of Ramadan and the cause from which flows the duty to fast. According to the second verse, kinship is the cause of inheritance. According to the third verse, constraint is the cause for consuming what is normally forbidden.

B) Cause dependent on the will of the person in charge

The Koran says:

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God (112/5:38).

The fornicatress and the fornicator, you shall lash each of them one hundred lashes (102/24:2).

In the two verses, stealing is the cause for the cutting off the hand of the thief, and adultery is the cause for meting out the lashes. Similarly, the contract of marriage, that of sale or lease, are the causes for the ensuing consequences.

Muslim jurists consider that the link between the cause and the effect is determined by God. Man cannot break this link at will. Thus, one cannot inherit if there is no relationship of kinship, just as one cannot be deprived of one's inheritance if there is a relationship of kinship. Similarly, one cannot cut the hand off a person who has not stolen, just as one cannot avoid doing so in case of theft. Every cause produces an effect and there is no cause without effect.

2) Condition (*shart*)

Muslim jurists define condition (*shart*) as follows:

The evident and constant attribute whose absence entails the non-application of a judgment, but whose presence does not necessarily lead to its application.

Thus, the existence of a valid marriage is the preliminary condition for a divorce. If the marriage is not valid, divorce cannot take place. Similarly, making ablutions is

the preliminary condition for the accomplishment of prayer; nevertheless, it is possible to make ablutions without performing prayers. Muslim jurists distinguish two categories of conditions:

A) Legal condition (shart shar'i)

The conditions can be fixed by the Legislator. They constitute a necessary element of the accomplishment of an act. For instance, it is necessary to wash oneself in order to perform prayer validly. In that case, the ablution is an act external to prayer. When an act is a constituent part of the act itself, it is called *ruk'n* (pillar) and not a condition. Thus, inclination and prostration constitute an integral part of prayer and are not the condition for it.

Legal condition can be divided into two categories:

- A condition complementary to a cause: hence, testimony is a condition for a marriage contract which itself is the cause of the marriage. Similarly, the intention (*ta'ammud*) is the condition for the murder which itself is the cause for the punishment.
- A condition complementary to a causative act: the death of a person and the survival of the heir are the two conditions for the inheritance which, in turn, are founded on marriage or kinship.

B) Conventional conditions (shart ja'li)

Parties can include conditions in their acts. The following categories of conditions are distinguished:

- Acts that allow for any condition: in this case, acts remain valid whatever the condition imposed by the interested parties. It is the case for the testament, a mandate, transfers and votive obligations.
- Acts which admit a convenient condition: it is the case for guarantees or commercial permissions for a minor.
- Suspended conditions (*mu'allaq*): the Legislator has established contracts in order to produce their effects through unconditional consent and absolute choice, without hesitation. It is the case for bilateral contracts like sale or marriage. If these contracts are accompanied by suspended conditions, they become void.
- Restrictive conditions (*muqayyad*): thus a man can marry a woman on condition that they live together in the house of his father or on condition he does not make her go away from a given residential area.
- Supplementary conditions: this concerns conditions which postpone a contract to a later period. Thus, one signs a leasing contract that becomes effective in three months' time. The contract is valid *ab initio*, but only becomes effective later.
- Accompanying conditions: some conditions are added to acts, for the realization of their interests, without them making the signing of the contract dependent on these conditions. Thus, a woman can say to a man: "I will marry you if you do not oblige me to leave Cairo." In that case, according to the Hanafites, the con-

tract remains valid even if this condition is not respected, unless the marriage is absolutely linked to its actualization. For the Hanbalites, such a condition is valid unless proven otherwise and the entitled can ask for the dissolution of the marriage in case of the violation of the condition.

3) Impediment (*mani'*)

It is what impedes the implementation of a norm or a cause:

- Impediment of the implementation of a norm: a norm prescribes that the next of kin or marriage has as an effect the possibility of inheritance. However, if a person is of a religion other than that of the deceased or if he had made an attempt on the life of the latter, inheritance cannot take place.
- Impediment of the cause: in order to pay the tithe, the concerned goods have to be of a certain amount. But if the person has debts, these impede the payment of the tithe.

It should be pointed out here that one thing can be at one and the same time a cause, a condition and an impediment. Thus, faith is a cause for the recompense, a condition for the obligations and an impediment for the application of the law of retaliation when the victim of a Muslim is a Muslim. All the Muslim jurists agree to this, with the exception of the Hanafites.

4) Validity and invalidity of acts

Muslim jurists classify acts as valid (*sahih*) and invalid (*batil*). Valid acts are those accomplished in accordance with the manner prescribed by the Legislator and when the essential elements and the legal conditions he has stipulated are united. On the contrary, if an essential element or a legal condition is lacking, the acts are considered invalid. Valid acts engender effects foreseen by the law. Thus, when one gets married in a valid manner, that renders licit sexual intercourse and imposes duties between the two spouses. If, on the contrary, the contract is invalid, it is not affected by the above mentioned effects.

Hanafites add a third classification. They distinguish between valid acts, invalid acts and vitiated acts (*fasid*). They consider as vitiated acts those whose non-essential element is defective. Such acts produce some juridical effects. For example, a sale done by a mad man is an invalid sale, but a sale done without the price of the object having been fixed beforehand is a vitiated act which leads to the change of hands of ownership, the price having to be fixed later. Marriage contracted without witnesses is considered vitiated. If it is not consumed, the contract is void and without effect. But if it is consumed, the two spouses get separated, but the wife has the right to dowry and must respect the legal waiting period; furthermore, the child born from the attempted marriage is acknowledged as being that of the father.

The triple distinction of the Hanafites limits itself to temporal transactions. Cultic acts are either valid or null. In what concerns temporal transactions, Hanafites plead *in favorem contractu* as much as possible in order to safeguard people's interests.

III. Object of the norm (*al-mahkum fih*)

1) Precise and possible objects of the norm

A juridical norm has a scope. It aims at an act or a conduct that it would like to see respected. Thus, the Koran says:

O you who believed! Fulfil the contracts (112/5:1).

O you who believed! When you contract a debt until a named term, then write it down (87/2:282).

Do not kill your children for [fear of] poverty (55/6:151).

The Legislator demands in these three verses that commitments be respected, he recommends that the debt be put in writing and he forbids the killing of one's children out of fear of poverty.

In order for an act or a conduct to become the object of a norm, it must be clearly decreed so that the person to whom the norm is addressed can perfectly accomplish it. Some acts are enounced by the Koran in general terms, without precision. For instance, verse 87/2:43 says: "Perform the prayer." The order has no meaning because it is not precise. Jurists have therefore had to have recourse to the *Sunnah* of Muhammad in order to know what is meant by the prayer and its modalities.

Moreover, it is necessary that the person bound to accomplish the act be aware of the existence of the order. In that case, it is called "what is necessarily known." It is considered in this regard that every Muslim found in the Muslim territory is supposed to know what is necessary in matters of religion. This corresponds to the adage: "Nobody is supposed to ignore the law."

Finally, it is necessary that the act which is the object of the norm is possible to accomplish. This corresponds to the adage: "Nobody is bound to do the impossible."

Impossibility can be intrinsic, like the fact of asking someone to accomplish two contradictory acts at the same time: to sleep and to keep awake at the same time, or to be present in two different places at the same time.

Impossibility can be extrinsic, like flying without any external assistance, lifting a mountain, walking when one has incapacitated limbs, or do what eludes any control. Thus, it cannot be asked of someone to be taller than he really is, to cease breathing or blushing.

The fact of asking someone that a third party fulfils a duty constitutes impossibility. Thus, it cannot be asked of someone that his brother pays taxes or that his father performs the prayer. At most, he can be asked to advise him, but he cannot be held responsible for his brother's refusal to do so.

2) Interpretation of impossible norms

If Muslim jurists have dwelled so much on these details, it is because the Koran and the *Sunnah* seem to give orders that are impossible to execute. They therefore endeavour to interpret them in the light of previous rules. Here are some examples:

- Muhammad said: "Do not get angry!" Jurists consider that the hadith does not forbid anger, something that would be impossible to do, but it warns against the

bad consequences of irascible behaviour. It invites the person to control himself when he gets angry. Muhammad says in this regard: "The judge should not issue his judgment when in anger." It also encourages to avoid whatever provokes anger.

- Muhammad said: "Let there be, before God, the victim and not the murderer!" This could be understood as an encouragement to get oneself killed, which is contrary to the instinct of survival. Jurists have interpreted this as meaning you should not be aggressive with others.
- The Koran says: "So that you may not sadden for what escaped you, nor exult for what he gave you" (94/57:23). This seems to forbid sadness and joy, both of which are natural sentiments. Jurists say that the verse must be interpreted as meaning that one should not be carried away by sadness or joy to the point of forgetting to be reasonable and decent.

Chapter V. The addressees and beneficiaries of norms

I. Addressees of norms

According to Islamic law, when God establishes a norm, he does it for two reasons:

- 1) To improve the earthly life of the addressee of the norm and to prepare him for the Hereafter. The reader can refer back to the chapter on the objectives of Islamic law.¹
- 2) To prevent the addressee of the norm from feigning lack of awareness of the norm:

[...] and messengers whom we have narrated to you before, and messengers whom we have narrated to you. And God spoke directly to Moses (92/4:164).

This is a blessed book that we descended. Follow it and fear [God]. Maybe you be shown mercy! Lest you should say: "The book was descended only to two groups before us, and we were inattentive of their study" Or lest you say: "If the book was descended to us, we would have been better guided than they" (55/6:155-157).

In order for a person to be considered bound to respect a norm he must be able to understand it, have the capacity to assume it and not being incapacitated to carry it out.

1) Comprehension (*fihm*) of the language of law

Each country publishes its laws in the official language. Translations of laws are not evident. For the Muslims, Arabic constitutes the official language of Islamic law. The Koran says:

These are the signs of the manifest book. We descended it an Arabic Koran. Maybe you discern! (53/12:1-2).

¹ See Part III, chapter III.

Thus we descended it an Arabic judgment (96/13:37).

Thus we have revealed to you an Arabic Koran, so that you may warn the mother of the cities and those who are around it (62/42:7; see also 45/20:113; 47/26:195; 59/39:28; 61/41:3; 63/43:3; 66/46:12).

Knowing Arabic is a necessary prerequisite for the comprehension of Islamic law. A part of the branch of the principles of law is dedicated to the structure of Arabic as an instrument of interpretation of juridical norms, as was seen in chapter II of the current part. The Koran, collections of the *Sunnah* and all the treaties of classic Islamic law are written in Arabic. Translations, perfect as they may be, cannot exempt a Muslim jurist from working with versions in original Arabic. However, the Koran says that its message is addressed to all:

We only sent you as a mercy for the world (73/21:107).

Blessed is he who descended the salvation on his servant, so he can be a warner to the world (42/25:1).

Elsewhere, the Koran binds the Muslims to uphold these norms:

From among you there should be a nation calling for the good, commanding the appropriate, and forbidding the detestable. Those are the successful (89/3:104).

In order to reconcile the particularity of the Arabic language and the universality of the Islamic message, Muslim jurists consider that it is necessary to enforce Arabic everywhere. This is one of the reasons why Arabic became the *lingua franca* of countries in the Middle East, the Maghreb and Andalusia, in spite of them having their proper national languages. In default of being able to spread Arabic everywhere, Muslims have to learn the languages of other nations in order to teach them about Islam. Access to the norm is the prerequisite for the accountability of respecting the norm. Khallaf writes in this regard:

The person who does not understand the language of the Koran, who cannot have access to its message and does not have at his disposal translations in his own language of these texts, and to whom the message was not explained in a language that he understands, cannot be considered responsible in the eyes of Islamic law.¹

2) Capacity (*ahliyyah*)

Capacity is divided into two categories:

A) Capacity of obligation (*ahliyyat wujub*)

Man is able, as soon as he comes into existence, whatever his age or sex, to have rights and duties. This lasts as long as life itself, even beyond death, as we shall see later. Capacity can be:

- Reduced: the ability to have rights without duties, as for the foetus;
- Complete: the ability to have rights and duties. This starts from birth.

B) Capacity of action (*ahliyat al-ada'*)

Man has the capacity to undertake acts which produce effects. It can be:

¹ Hallaf: *Les fondements*, p. 199.

- Reduced: the ability to undertake determined acts and not others: such is the case for a child who cannot make any difference (*mumayyiz*) when he carries out transactions;
- Complete: the ability to undertake acts with total effects without having to depend on the opinion of others.

C) Capacity in line with stages of human life

Jurists distinguish different stages in the life of a human being, stages in which rights and duties evolve:

a) Intra-uterine life (janin)

It extends from conception to birth. The Legislator acknowledged for the foetus the capacity of reduced obligation. The existence of a human being alive in the mother has for effect the postponement of the share of the inheritance to the time of his birth. Thus, he acquires advantages without bearing the disadvantages, on condition that he be born alive.

b) Childhood (siba)

It extends from birth to the age of 7 years. The child, during this period, has a complete capacity of obligation. He can acquire rights and has obligations towards others: inheritance and leave heritage for others, being looked after and looking after others, pay the dime, be answerable for damage caused to what he owns. Nonetheless, he does not have the capacity of action: his guardian is in charge of claiming what belongs to him and to pay what he owes; what he says does not count for him, and should he kill the *de cuius*, he is not deprived of the inheritance.

c) Puberty (bulugh)

The Koran says:

Examine the orphans when they attain the marriage (*bulugh*). If you see in them righteousness (*rushd*), hand over their wealth to them (92/4:6).

The verse speaks about the moment when a person has the aptitude to marry or, more precisely, to copulate. The ability depends on physiological phenomena: the capacity of seminal pollution for the boys and the first menstruations for the girls. Starting from this moment, the person enters into the stage of puberty which lasts until the age of discernment fixed by the jurists between 15 and 18 years. During this stage, the human being has the complete capacity of obligation, but a reduced capacity of action. Thus, his damaging patrimonial transactions are null and those which are useful are, on the contrary, valid. The determination of what is useful and what is not depends on the authorization of the guardian. In what concerns his acts regarding religion, they are valid. Thus, if he becomes a Muslim, his conversion is taken into account on the successional and testamentary level: he cannot inherit from non-Muslim parents and can inherit from Muslim parents. If his wife is polytheist, the marriage is to be dissolved.

d) Discernment (rushd)

The above mentioned verse 92/4:6 distinguishes two stages:

- The *bulugh*, generally translated as puberty. The capacity to procreate and therefore to marry depends on this stage.
- The *rushd*, translated as discernment or maturity. The capacity to dispose of one's property depends on this stage. It extends from the age of 15, through to 17 or 18 years, up to senility. Here man disposes of two capacities: obligation and action, unless his capacity is impeded.

e) Senility

It extends from 70 years up to death. This stage is called second childhood. The old man, whenever it is duly observed that he is gone back to childhood, loses his perfect legal capacity; he falls, by consequence, into the condition of existence of an unemancipated child. He remains in these conditions up to the end of his life.

3) Non-impediment of the capacity

Impediments which can limit the capacity of someone are of two kinds: celestial or acquired:

A) Celestial impediments ('awarid samawiyyah)

They are impediments which do not depend on human will.

a) Mental alienation or madness (junun)

The loss or alteration of reason accompanied by agitations and perturbations to such a point that the person does no longer perceive the limits of what is considered by law as reasonable and therefore allowed.

A mad person loses in that case the capacity to act, but he continues to have the capacity of obligation. He is treated as a minor without discernment. In moments of lucidity, he is treated as being reasonable. Every transaction is forbidden for an insane person and every word he pronounces, be it for establishing a contract or in the framework of a legal situation, such as testimony, is null, except in extraordinary cases. Thus, the denunciation of a criminal act by an insane person is admitted where, although not constituting proof, his words can serve as an indication and lead the competent authorities to the arrest of the wanted law-breakers. An insane person is legally responsible for any damage he may cause to others; the entitled are compensated through deductions made from his fortune. An insane person does not incur legal penalties, but reclusion and isolation have been ordered by God for his own safety and for the safeguard of society; expiations are not his responsibility. He can neither dispose of his mortmain property for the benefit of pious foundations or public utility, nor give it away in alms. In what concerns good actions, such as faith, or the bad ones, such as lack of piety, an insane person, being unconscious, is considered to be morally dependent on his parents or his guardian.

b) Mental disorder ('ith)

It is the diminution of reason without perturbations and agitations. The ability of discernment differs depending on the individual. A person with a mental disorder can therefore be similar to a child with discernment or a child without discernment, and be treated as such.

c) Sleep (nawm) and fainting (ighma')

A sleeping man (fast asleep) or one who has fainted is exempt from the immediate execution of his pious duties and certain commitments. Thus, if the hour of prayer passes or if an expiry date passes without the tired and profoundly sleeping man waking up, he can redeem himself by executing, later, his religious duties; he pays for damage to his commercial commitments by paying, should that be the case, a just compensation to the entitled people. He is not liable to penalty neither in this life nor in the Hereafter should he commit adultery, drink alcohol or steal. He must, however, compensate the victims of these acts.

A sleeping man or one who has fainted is not responsible and cannot be alleged to have pronounced words having a juridical effect such as phrases establishing divorce, the constitution of a company or, if he is in charge of a juridical situation, even words attributable to a judicial sentence. Acknowledgement of debts, of any other obligation, or a punishable action, committed during the sleep, can only constitute, before law, an indication leading to thorough research of establishing the existence of a debt and its origin, just as for any other obligation even for a criminal act.

d) Oblivion (nisyan)

It consists in not remembering something in case of need. This state cannot affect the capacity of obligation or action with regard to human beings, and it cannot be used as a pretext. Thus, if someone damages the property of another through oblivion, he owes him compensation. In what concerns religious duties, oblivion is an impediment for the commitment of sins and the punishment in the Hereafter. Religious acts depend on the intention, which in this case is absent. This is the meaning of the verse: "Our Lord! Do not punish us if we forgot or erred" (87/2:286). Muhammad said: "Error and oblivion were removed from my nation."

Thus, if someone eats through oblivion, his fasting is not interrupted, for eating is more a natural act than fasting. Similarly, the fact of forgetting to pronounce the name of God while slaughtering an animal does not render the meat of the slaughtered animal illicit. On the contrary, he who eats during prayer, his prayer is invalid because prayer is supposed to remind man to adopt a certain attitude.

e) Deafness (samam)

Deafness at birth, often accompanied by dumbness, is an infirmity which renders man incapable of carrying out the responsibility of duty and to exercise his rights. The deaf-mute of birth is allowed to claim or to exercise his rights only through and under the guarantee of his guardian. He is not forbidden to marry, but the rights generated by the union in favour of the consenting wife over his property must be guaranteed by his tutor.

f) Weakness of memory (du'f al-hafidhah)

It comes as a result of the loss, more or less complete, of this faculty, following serious illness. A man who loses his memory and who is known in the country where he lives to have done so, is not to be subjected to exact and punctual execution of duties which are pure rights of God, such as prayers prescribed by the law.

He is also exempt from commitments contracted through third parties, such as the payment, with pre-established due dates, at a stipulated hour, prices of things that he bought; so that, if the fixed dates for the payment elapse, he cannot be condemned to pay compensation and interests, unless if the concerned, knowing his infirmity, effectively repeatedly reminded him to honour his commitments at the opportune moment, that is at the moment very close to the due dates.

g) *Illness (marad)*

It is not an impediment for the capacity of obligation or action, but it can be considered a mitigating circumstance in accordance with the following verse: "God does not charge a soul but according to its capacity" (87/2:286).

A distinction is made between illness contiguous to death and a non-fatal illness which ceases temporarily and allows for a re-establishment of a period of health. Juridical consequences differ in accordance with the category. Fatal illness deprives man of some of his rights.

Thus, the property of a man affected by a fatal illness ceases to be preserved from the interference of others. This means that the intervention of those entitled, with the objective of taking care of the interests of the sick, becomes legally accepted. The intervention results in a prohibition. Those entitled are the heirs and the creditors are those who have the right to share the property of the sick man. If the sick man is insolvent, that is if the debts exceed his possession, the totality, unless out of absolute necessity, can be impounded; if not, the law allows only the amount equivalent to the debt to be impounded. As for the heirs, they can impound two thirds of his fortune. They must, however, provide, for the remaining days of his life, all that is indispensable for him, such as food, his upkeep, payment of his medicine, the home nurse and the payment of the consequences of marriage. All this must be deducted from the two thirds of the fortune of the man affected by a fatal illness, with the understanding that the law does not allow, when a sick person is solvent, to interfere with the one third which he can freely dispose of up to the moment of his death.

h) *Menstruation (haydh) and birth (nifas) blood*

The two states do not impede the capacity of obligation or of action, but they postpone the obligation to fast to a period after the purification. They constitute an exemption from prayer.

i) *Incapacity for sex*

Women have less religious rights and duties than men. In general, they count for half the man in succession, penal and procedural law. Her place in marriage is inferior: she cannot repudiate and she is subjected to the correction of the husband. It is only with regard to patrimonial law that she is equal to man.

j) *Death (mawt)*

Death does not bring to an end rights and duties which flow from obligations contracted during one's life-time, such as debts and credits of the deceased.

Death does not bring to an end either the rights of others which the law considers as just and which are relative to precise and known objects: such would be the case

for a deposit or the collateral given as a guarantee of a loan. The rights of others which are not precise and determined do not have any effect on death. Such would be the case for commitment taken to stop a man from leaving his country. If the man escapes before or after the death of the guarantor, the deceased cannot be held responsible, that is his heirs cannot be legally held answerable, unless where a certain sum of money may have been stipulated in prevision of the situation where the man over whom one is answerable would disappear. The power of the attorney, given or accepted, is nullified by death.

Matters recognized by law as indispensable for the dead must be provided for and are deducted from his property, even in the case where he may have died insolvent: the shroud as well as what would be necessary for his burial. Creditors are only allowed to share the remainder of his property.

The rights of the deceased are transmitted to the heirs or the creditors who can claim objects and things the deceased may have left with them as guarantee or deposit, as well as his items which were usurped.

B) Acquired impediment (awarid muktasabah)

a) Imprudence, extravagance (safah)

It is the flimsiness of the human spirit that drives his passions and leads him to dispose of his property in a way the reasonable do not consider convenient and wise.

In this case, a person has his own reasons and disposes of his two capacities of obligation and action, but his property is withdrawn from him until he becomes reasonable. His commitments are dealt with as those of a child: the damaging acts are null, and those that are useful are valid, in accordance with the permission of the guardian. This is deduced from the following two verses:

Do not give to the insane your wealth which God has made a means of subsistence for you... Examine the orphans when they attain the marriage. If you see in them righteousness, hand over their wealth to them (92/4:5-6).

If the debtor is insane or weak, or cannot dictate himself, his ally should dictate with justice (87/2:282).

We should point out, however, that Abu-Hanifah (d. 676) objects to the withdrawing of property from a prodigal person, considering that loss of freedom is more serious than loss of property.

b) Intoxication (sakar)

Intoxication does not have any bearing on the capacities of obligation and action, but jurists have diverged on the value of the commitments of an intoxicated person, some do not take him into consideration because he does not comprehend what he says. Hanafites says that if he gets intoxicated by himself, his acts are valid and should be executed as a punishment for him. Hence, if he gets intoxicated by himself and repudiates his wife, the repudiation is valid; if his acts lead to damage, he must compensate the victim; should he commit a punishable act, he should be chastised. It is considered in this regard that the offence (of drinking alcohol) can serve

as an excuse for another offence. It corresponds to the adage: "*Nemo auditur propriam turpitudinem suam allegans*."

If intoxication is the consequence of the ingestion of opium prescribed by the doctor, or the consumption of wine to quench one's thirst, in case of absolute lack of water, no penalty should be inflicted on the intoxicated man. Repudiation, confessions, apostasy or words pronounced under such circumstances have legal value only if their author confirms them after having fully recovered his mind.

c) Travelling

Travelling is considered a mitigating circumstance. It is the fact of leaving one's place of residence with the intention of reaching another distant place of three walking days. It does not matter in this regard that the traveller reaches his destination or not. During the duration of the journey, the traveller benefits from mitigating circumstances:

- He can reduce the number of prayer genuflections from four to two.
- He can, without committing sin, postpone the time of fasting.
- The man who has started a day of fasting, if he is obliged to travel, must not break the fast before the end of that particular day.
- The man who finds himself constrained to stay for fifteen days in the same country, when his functions or businesses oblige him to travel around the country and to spend the whole day on the horse, ceases to be considered a traveller and must fulfil all the religious practices and all the other duties, for law considers him as a resident of that country.

In order to benefit from the mitigating circumstances, the journey must be licit. Such is not the case for the journey undertaken in order to steal or to rebel.

d) Ignorance (jahl)

Ignorance can signify the fact of not knowing what one should know, or knowing the contrary of what is the reality. It does not affect the capacity, but at times it can serve as an excuse:

- Inexcusable ignorance: it is the ignorance of what is evident or proven in a clear manner. It is equivalent to negation (*juhud*) or pride (*mukabarah*): denying the existence of the Creator, his superiority over creatures and the sending of the apostles.
- Excusable ignorance: it is the ignorance of a fact which can lead to confusion or which is not clear. It is the case for a representative who conducts himself ignoring the fact that he has been dismissed from his post. The same goes for the one who becomes a Muslim in a non-Muslim country and conducts himself, out of ignorance, contrary to Muslim norms. By contrast, a Muslim living in a Muslim country cannot pretend not knowing Muslim norms: he cannot for instance pretend that he was ignorant of the duty to pray, to fast or not to steal or commit adultery.

e) Error (khata')

It is the accomplishment of an act contrary to the intention of the author. Error is like forgetfulness: it does not concern the capacity and cannot be cited as a pretext with regard to the rights of others, but it can be considered so with regard to the rights of God.

Thus, he who sleeps with a woman believing that she is his shall not be considered an adulterer. He who kills another person by error shall not be condemned to death in accordance with the law of retaliation, but he must perform an act of repentance:

It is not for a believer to kill another believer, unless it is by error. Whoever kills by error a believer must free a believing [slave]'s neck and pay to his family the blood-money, unless they remit [it as] alms... Whoever does not find, should fast two consecutive months as repentance from God. God was knower, wise (92/4:92).

In Islamic law, the two above mentioned offences pertain to the category of the rights of God.

By way of contrast, he who violates the rights of the other by destroying, for example, his property by error, must pay the recompense, but he shall not be physically punished. He who, instead of saying to his wife: "Give me to drink," says to her: "You are repudiated," is to be considered as having repudiated his wife, according to the Hanafites. The Shafi'ites consider that there is no repudiation in such a case, as long as there was no such intention. They consider error to be like sleeping and fainting.

f) Constraint (ikrah)

This is making a person say or do what he does not accept and would neither have said or done had he the choice. That the author of the constraint is capable of executing his threat and that the constrained person had every reason to think that he was going to act upon it, is not to be taken into consideration.

A distinction is made between the characterized constraint (*mulji'*) which endangers life, the physical integrity or the entire property, be it of the menaced person or one of his close relatives, and the simple constraint (*ghayr mulji'*) which does not endanger life, the physical integrity or the entire property, such as imprisonment or battering, and which can be easily endured normally.

Constraint has no bearing on capacity, but characterized constraint suppresses consent and renders choice vitiated. In fact, for the Hanafites, there is a separation between consent and free choice, in the sense that every consenting person has a choice, but not the contrary.

They then distinguish between what is said and the acts:

- With regard to what is said, the distinction between characterized constraint and simple constraint is not taken into account. If what is said is declaratory, it is void, as in the case of joking, for consent is lacking. If what is said is constitutive, the distinction made in the case of joking is also applied to it: some acts are influenced by constraint, others not.

- With regard to acts, if they are accomplished following a simple constraint, the responsibility lies with the author and not with the person who exercises the constraint. If the constraint is characterized, in what concerns the acts that can be carried out in case of necessity (eating pork, drinking wine, etc.) or destroying the property of another person, it is preferable not to subject oneself to constraint, even when one can benefit from the exemption. The responsibility over what is damaged lies with the constraining agent. If, on the contrary, the acts are forbidden in any case, such as committing murder, the author of such acts commits sin and the constraining agent is considered a murderer. The constrained person is considered here as an instrument in the hands of the constraining agent.

g) Slavery

The slave, if a Muslim, is bound by religious duties, to the same level as a free man. One becomes a slave only through birth from parents who are themselves slaves, or as a result of *jihad*, never because of debts. The slave is subjected to his master for a greater part of the acts of his life. With his permission, he can marry, have children, and gather some savings for himself. But he is above all considered an aspect of the patrimony of his master, which leads to multiple juridical consequences. We are not going to enter into details in what concerns this category¹ due to the fact that slavery has been abolished and subsists only in some countries such as Mauritania and Sudan, and probably in Saudi Arabia.

h) Disbelief

The disbeliever in general is bound by the divine discourse: What conveyed you in Saqar? They will say: "We were not of the praying..." (4/74:42-43). His duty is first of all conversion, but he is not obliged to perform, following his conversion, all the acts he should have accomplished during the time of his disbelief. Disbelievers are classified into two principle categories, the protected and the others.

The protected (*dhimmis*) are the People of the Book: Jews, Nazarenes, Zoroastrians, Sabians, and often the polytheists as a matter of tolerance. They are allowed to live among the Muslims who are responsible over them, in conformity with the pact of protection. The protected must conform to a special status. He cannot marry a Muslim, but a male Muslim can marry a *dhimmi* woman

Polytheists and apostates belong to the least favoured category. The polytheists have the choice between converting to Islam or fight to death. They are accorded a treaty of peace only if they are stronger than the Muslims, and the treaty must be of a limited duration. The apostates, if they do not retract, must be put to death or, in case of a woman, subjected to life imprisonment. Their marriage is dissolved and their inheritance is liquidated. They cannot inherit and their property can only be given to Muslim heirs or to the Public Treasury.²

¹ For more information about the juridical consequences of slavery, see Savvas, Part II, p. 521-526.

² For more details, see Part I, chapter III.

4) Delegation of responsibilities imposed by the norm

Muslim jurists ask themselves whether one can delegate duties over which one is responsible. They make a distinction in this regard between two categories of norms.

A) Norms concerning temporal relations among men

These acts can be the object of delegation unless the reason of the legitimization of these acts does not concern a particular person: such as the fact of eating, drinking or marrying, as well as corporal punishments.

B) Norms of a cultic nature

These norms do not admit delegation. The fact that some people observe these norms does not exempt the addressee from observing them in his turn. Several Koranic verses are cited in this regard:

Every soul earns what is for it, and no bearer of a burden can bear the burden of another (55/6:164).

Whoever is guided is guided only for himself. Whoever is misguided is misguided only against himself. No burdened [soul] will be burdened with another's burden (50/17:15).

O humans! Fear your Lord and dread a day when no father will avail his son, nor will a son avail his father at all (57/31:33).

A bearer of burdens cannot bear another's burdens. If one heavily laden should call [another to bear] his load, no other can carry any part of it, even if they were related (43/35:18).

that to the human reverts only [the fruit of] his endeavour; that his endeavour will be shown to him (23/53:39-40).

The day on which no soul possesses anything for any other soul, and the affair on that day is to God (82/82:19).

Several narrations of Muhammad bear the same meaning. One can, however, object here by citing a narration of Muhammad according to which:

When a son of Adam dies, his acts cease except in three cases: the giving of alms which continues, useful science and a just son who prays for him.

In another narration, Muhammad may have said that alms given on behalf of the mother can be praiseworthy for her. In a third narration, Muhammad may have said to someone to go on pilgrimage or to fast on behalf of a deceased person. Similarly, it is a known practice to pray for the dead.

The first narration, they retort, signifies nothing other than that he who does good will have his recompense due to his acts. As for the other acts, they are praiseworthy with regard to those who accomplish them and not to those for whom they are performed.

II. The beneficiary of the norms

A norm is established in order to serve an interest. Positive law distinguishes between individual and community interests by according, at times, prevalence of the

individual over the community or vice-versa according to the ideological trend by which the legislator was inspired. In any case, the latter is not interested in the salvation of souls in the Hereafter.

Religious law, on the contrary, accords an important place to the relation between men and God by establishing a reciprocal influence on the relations of the human beings themselves and their relation with the divinity. Muslim jurists classify in this regard the rights in four categories and endeavour to regulate the conflicts that may arise among these rights.

1) Rights reserved to God

Muslim jurists consider that certain rights belong exclusively to God, and establish the equivalence between these rights and the rights of society. No one can in this regard give up his rights. This corresponds, for the contemporary Muslim jurists, to the concept of public order in positive law.

The rights that belong to God comprise three kinds of acts:

- Acts related to God's worship. Man is bound to conform to the worship of God as much for his good as for the good of the community. It is above all question of faith in God, in the prophetic mission of Muhammad, as well as the divine origin of all that he transmitted to humanity. And then the consequences of this faith, as acts of worship strictly speaking (prayer, fasting and pilgrimage) or acts which are beneficial to others (alms-giving during feast of *fitr* and tax on one's fortune). These are also part of obeying God's orders and non-violation of prohibitions in the acts of worship (the ablution before prayer) or in the relations among men (refraining from usury). *Jihad* (holy war) is also considered a right belonging to God since its objective is to spread faith.
- Taxes: it concerns land, a fifth of the booty, treasure and minerals of the earth, as well as property acquired from the enemies without fighting them. The use of the taxes is fixed by the Koran and belongs, by consequence, to the rights of God:

The alms are for the poor, the paupers, those who work for them, those whose hearts are rallied, [the emancipation] of the necks, those who are overloaded [of debts], the [struggle] in God's way, and the traveller. [It is] an imposition from God. God is knower, wise (113/9:60).

Know that the spoils you acquire, a fifth belongs to God, to the messenger, to the relatives, to the orphans, to the paupers, and to the traveller, if you believed in God and in what we descended to our servant, the day of the salvation, the day when the two gatherings met. God is powerful on everything (88/8:41).

Whatever God allocated as spoils to his messenger from the people of the cities belongs to God, the messenger, the relatives, the orphans, the paupers and the traveller, so that it not be in alternation between the rich among you. Take what the messenger gave you, abstain from whatever he forbade you, and fear God. God is severe in punishment! (101/59:7).

- Penalties (*hadd*): some of the sanctions mentioned in the Koran or the *Sunnah* are God's preserve (and therefore of society). They do not depend on the indi-

vidual's will. Such is the case for the sanctions foreseen against adultery, stealing, robbery, depriving of heritage for who murders the heir and sanctions of expiation (*kaffarat*).

We can point out here the difference between positive law and Islamic law. Thus, positive law punishes extra-marital sexual relations only if there is a minor concerned or if there had been constraint. If a married woman commits adultery, her act is only punished if the husband lodges a complaint. The husband can also stop the penal process by his own initiative. In Islamic law, extra-marital sexual relations are considered God's rights (and therefore society's), and the individual cannot freely dispose of them or forgo his right.

2) Rights exclusively for the individual

These rights aim at serving private interests of the individual. Part of this category are patrimonial rights such as compensation, recovery of debts and blood price, the claim of the price of a sold item and rentals. Here, the beneficiary can claim his right or eventually forgo it.

3) Rights belonging to God and to the individual with the prevalence of God's right

Part of this category is the sanction foreseen for the unproven defamation of adultery. It is to be considered here that such an offence harms honour and spreads vice. The sanction of this offence is part of God's rights in the sense that it protects society. It is also part of the rights of the individual because it protects his honour. However, God's right is superior to that of the individual. As such, the latter cannot give up on the applied sanction.

Part of this category are also the sanctions foreseen in case of damage to life and the physical and mental integrity (through consumption of alcohol) and the misappropriation of property. In such cases, man cannot freely dispose of his rights.

4) Rights belonging to God and to the individual with the prevalence of the right of the individual

It is the case of the law of retaliation against voluntary murder. The preservation of life is of benefit to the community in whose interest it is to chastise the guilty and this is where God's right is situated. The law of retaliation, however, serves principally to extinguish the desire of revenge of the entitled. As such, the individual has the right to forgo (through forgiveness or/and through compensation) and the guilty can be subjected to the law of retaliation only on request from the entitled (the guardian of the victim). The Koran foresees in this regard the sanction, but encourages the victim to give it up:

O you who believed! It is prescribed for you retaliation in the killed: free man for free man, slave for slave, female for female. And for him who is forgiven anything by his brother, prosecution according to usage and payment unto him in goodness. That is a lightening from your Lord and a mercy (87/2:178).

Do not kill the soul that God has made forbidden, except by right. Whoever is killed oppressively, we made authority to his ally. But he should not be excessive in killing, because he is already succoured (50/17:33).

These Muslim norms are different from positive law which punishes murder even if the entitled forgives. It can be pointed out here that positive law insists more on life than on honour and the preservation of family relations, whereas Islamic law puts the accent on the latter. Thus, according to positive law, the victim of theft or of adultery can forgive by letting go the sanction, whereas for Islamic law the forgiveness of the victim does not entail dropping the sanction.

In matters of theft, the Koran says:

As to the thief, man or woman, cut off their hands, in reward for what they earned, as intimidation from God. God is mighty, wise! (112/5:38).

Can the State punish automatically, without there first being a complaint? Can the victim of theft forgive? In other words, does human right prevail over God's right? Muslim jurists diverge in this domain.

Chapter VI.

The mitigation of the norm

In principle, a Muslim must accomplish the religious duties as prescribed. Nonetheless, in particular situations, he can be exempt, just as he can endeavour to accomplish them in spite of the difficulty. Jurists have developed in this regard the notions of exemption, dissimulation, ruse and priority, of which we speak in the following points.

I. Exemption (*rukhsah*)

The Koran mentions cases of exemption of certain duties which were imposed on other communities, namely the Jewish community. Thus, it is not asked of a Muslim to purify his gown by cutting off the dirty part, to kill himself as a sign of repentance, to pray exclusively within the prescribed place of cult. This is in accordance with the two following verses:

Do not place a burden upon us as you have placed upon those before us. Our Lord! Do not place upon us what we cannot bear. Absolve us, forgive us and have mercy on us (87/2:286).

Those who follow the messenger... [who] orders them the appropriate, forbids them the detestable, permits to them the good [things], forbids them the bad [things], and removes from them their burden and the shackles that were on them (7:157).

The Koran allows not to accomplish a duty or to shorten it in case of illness or travelling:

Whoever of you witnesses the month, he should fast it! Whoever is sick or on a journey, a number of other days. God wants ease for you, he does not want hardship for you (87/2:185).

When you speed up on the earth, there is no blame on you to shorten the prayer, if you fear that those who disbelieved will try you. The disbelievers were for you a manifest enemy (92/4:101).

It allows not to conform oneself to certain prohibitions. Thus, it is allowed to eat the meat of a dead animal or pork and to drink blood in case of necessity although these acts are normally forbidden:

He has forbidden you carrion, blood, pig's meat and what is sacrificed to other than God. But whoever is forced, and is not rebel nor transgressor, there is no sin upon him. God is forgiver, very-merciful (87/2:173).

Exemption is considered a favour that God grants to the believer in order to facilitate life. Rigour ('*azimah*') in the application of the norm is, however, preferable to having recourse to exemption. In so doing, the Muslim resembles Noah, Abraham, Moses and Jesus who the Koran qualifies as men of great endurance (*ulu al-'azm*). The Koran says:

You will be tested in your wealth and yourselves, and you will hear much hurt from those who were given the book before you, and from the associators. But if you endure and fear [God], that is an affair of great resolution! (89/3:186).

O my son! Perform the prayer, order the appropriate, forbid the detestable and endure whatever touches you. That is an affair of great resolution! (57/31:17).

Nonetheless, if the application of a norm in all its strictness leads to death, the concerned person is obliged to choose mitigation in accordance with the following verses:

Spend in God's way. Do not throw [yourselves] with your hands into perdition (87/2:195).

Do not kill yourselves. God was very-merciful to you (92/4:29).

Thus, one should eat pork and drink wine in case of necessity in order to save his life. Similarly, one should break the fasting in case of illness or travelling if the fasting puts one's life in danger of death. He who does not do so commits sin. It is believed that the abstinence of a believer in this domain has no value whatsoever on the level of religion: it benefits neither the propagation of Islam, nor the strengthening of the Muslim community.

In other cases, the believer has the choice between sacrificing his life or benefiting from the exemption. Thus, if he is constrained to apostatize, he should, by preference, remain firm even by risking his life, but he can also dissimulate his faith. Similarly, a Muslim must denounce the evil he sees. However, if the governor is unjust and kills the one who denounces the evil, the Muslim has then the choice to remain firm in denouncing the evil even by risking his life, or keeping silence in order to save it. We shall come back to this question in point III which is dedicated to dissimulation.

Several juridical rules mentioned in the *Majallah* are dedicated to exemption, among which:

Article 21 – Necessity renders prohibited things permissible.

Article 22 – Necessity is determined by the extent thereof.

Article 23 – Whatever is permissible owing to some excuse ceases to be permissible with the disappearance of that excuse.

Article 24 – When a prohibition is removed the thing to which such prohibition attaches reverts to its former status of legality.

II. Ruse (*hilah*)

1) Negative attitude towards ruses

The term ruse (*hilah*) is used once in the Koran:

[To] those, oppressors to themselves that the angels take away, [the angels] will say: "What were you in?" They say: "We were weakened on the earth." [The angels] will say: "God's earth was not ample [enough] so that you may emigrate thereto?" Those, gehenna will be their shelter. How evil is the destination! Except the weakened from the men, the women and the children, who were not able to find means, and were not guided in the way. Those, maybe God will forgive them. God was gratuitous, forgiver (92/4:97-99).

Ruse can be found in all the domains. In matters of politics, it aims at confounding the enemies, and because of this, it is considered a positive attitude. Thus, the work of an anonymous author (from the 13th/14th century) *Al-siyasah wal-hilah 'ind al-'arab* (Politics and ruse among the Arabs) cites a popular proverb which says: "A marrow is better than a head without ruse."¹ Al-Jahidh (d. 868) finishes his book *Kitab al-taj* with a chapter on ruse. He writes that the happiest king is the one who conquers his enemy through ruse and deceit. The king should have recourse to war only if the ruse does not allow him to attain his objective.² Muslim authors have also used the term *hilah* in matters of technology to designate prowess.³

What interests us here, however, is having recourse to ruse in order to mitigate the force of a juridical norm, even to evade it. In this regard, it is perceived in a negative way. He who writes about ruse, teaches it or calls for it, is considered a disbeliever (*kafir*). The Koran accuses Jews of having invented ruses in order to circumvent law. They used to dig ditches on Friday so that the fish would fall into them on the day of rest, and be taken on Sunday. Thus, they diverted from the legal prohibition of working on Saturday: "Ask them about the city which stood by the sea, when they transgressed the Sabbath!" (7:163). Muhammad also said: "Do not commit what the Jews used to do by rendering licit what God had forbidden through the vilest ruses." It is reported in this regard from 'Umar (d. 644): "Should they bring me someone who shows ruse, I would stone him to death, together with the victim of ruse." Ruse is identified with deception, condemned by the Koran: "They try to deceive God and those who believed; but they only deceive themselves, while they do not perceive" (87/2:9).

Certain jurists consider that not all ruses are forbidden. For them, the person who has recourse to the illicit ruses should be blamed as much as the one who loses his rights through ignorance of the ruses. Similarly, it is useful to know ruses in order not to be duped. They cite 'Umar (d. 644): "I never duped anybody and I do not let anybody dupe me." Moreover, there are concessions in favour of ruse even among

¹ *Al-Siyasah*, p. 25.

² Al-Jahidh: *Kitab al-taj*, p. 176.

³ It is the title of the book of Al-Jazari: *Kitab fi ma'rifat al-hiyal al-handasiyyah*.

the fiercest opponents. Thus, Ibn-Qayyim Al-Jawziyyah (d. 1351), though a Hanbalite, cites 116 ruses which he considers to be authorized in Islamic law.

Around twenty classic works are dedicated to ruses,¹ but by reason of their negative connotation, rare are the manuscripts edited by Muslims. Three of the classic works were edited by Joseph Schacht, whose Jewish origin – and therefore bad intention – is underlined by Muslim authors.² The attribution of one of these works to the great jurist Al-Shaybani (d. 805) is moreover questioned, as much in the past as at present, considering that such a work is unworthy of him.³ Few contemporary works deal with ruses, and the works on the principles of law generally say nothing about them. Let us point out here that a good number of the ruses recorded by classic jurists concern anecdotes: what to do in order not to commit perjury when a man swears not to walk on a mat? He walks on two mats. What to do if a woman is on the ladder and her husband swears to repudiate her if she climbed up or climbed down from the ladder? She should be lifted and brought down from the ladder. What happens if a woman holds in her hand a fruit and her husband swears to repudiate her should she throw it away, eat it or keep it in her hand? She can eat half of it and throw away the other.

2) Legitimization of the recourse to ruse

A) Arguments drawn from the Koran

We have cited the Koranic passage 92/4:97-98 which uses the term *hilah*. Partisans of the recourse to ruse further cite the last phrase of the following Koranic passage:

O Prophet! When you repudiate wives, repudiate them following their waiting period; and count the waiting period. Fear God your Lord. Do not bring them out of their houses, and neither shall they leave, unless they commit a manifest depravity. Those are God's bounds. Whoever transgresses God's bounds, oppresses himself. You do not know! Maybe God brings about a new situation thereafter! When they have reached their term, retain them according to usage, or part of them according to usage. Take as witnesses two just [men] from among you, and set up the testimony for God. Wherewith is exhorts he who among you believes in God and the last day. Whoever fears God, he will make for him an outlet (*makhraj*), and provide for him from whence he does not think (99/65:1-3).

The outlet (*makhraj*) mentioned in the last phrase would be the use of ruses allowed for one who finds himself in difficulties. Because of this, monographs and chapters on ruses bear the title *makharij* (pl. of *makhraj*). It is considered that Is-

¹ See the list in the introduction written by the author of the book of Ibn-Battah: *Ibtal al-hiyal*, p. 38-45. Besides this book, we cite: Al-Qazwini: *Kitab al-hiyal fil-fiqh*; Al-Shaybani: *Kitab al-makharij fil-hiyal*; Jassas: *Kitab al-hiyal wal-makharij*; Ibn-Taymiyyah: *Iqamat al-dalil'ala ibtal al-tahlit*; Ibn-Qayyim Al-Jawziyyah: *I'lam al-muwaqqi'in 'an Rab al-'alamin*, vol. 3, particularly, p. 209-502 and vol. 4, p. 5-62; Ibn-Qayyim Al-Jawziyyah: *Ighathat al-lahfan min masa'id al-shaytan*; Al-Sarakhsi: *Kitab al-mabsut*, vol. 15, tome 30, p. 209-244. See also the contemporary monographs: Al-Dib: *Al-hiyal fil-qanun al-madani*; Ibn-Ibrahim: *Al-hiyal al-fiqhiyyah*; Buhayri: *Al-hiyal fil-shari'ah al-islamiyyah*.

² Ibn-Ibrahim: *Al-hiyal al-fiqhiyyah*, p. 45-55.

³ Ibn-Battah: *Ibtal al-hiyal*, p. 38-40.

Islamic law has two poles: severity and leniency. He who is needy and finds a response in leniency remains within the framework of the law.

Opponents of the theory say that the truncated passage has nothing to do with ruses. It simply encourages to the fear of God who levels the difficulties and accords his benefits to those who fear them and proceeds with the repudiation in conformity with the prescriptions of God.

They also cite a ruse which God, according to the Koran, taught Job. The latter had sworn to give his wife 100 lashes of a whip. As he neither wanted to harm his wife nor give false evidence, God suggested to him to take a tuft of grass (from a hundred sprigs) and to administer one lash to his wife: "Take in your hand a bundle, beat with it, and do not break your oath." We found him enduring. What a marvelous servant! He returned frequently [to God] (38/38:44). In another narration of the Koran, Joseph hid the big cup of the king in the baggage of his brother in order to be able to hold him back by accusing him of having attempted to steal the cup. God inspired the ruse to Joseph: "So we plotted for Joseph. It was not for him to take his brother, according to the king's religion, unless God so wished" (53/12:76). God drew good from evil through ruse.

Opponents consider that the two Koranic narrations are specific to the two personalities cited, or concern laws revealed to Jews which do not apply to Muslims, in accordance with the verse: "To each of you we made legislation and conduct" (112/5:48).

The partisans of the recourse to the ruse also cite the fact that the Koran often qualifies God as the best of the plotters:

They plotted, and God plotted. God is the best of the plotters! (89/3:54).

They are plotting a plot, and I am plotting a plot (36/86:15-16).

The hypocrites seek to deceive God, but it is he who will deceive them (92/4:142).

In that time, those who disbelieved plotted against you to arrest you, to kill you or to oust you. They plot, and God plots. God is the best of the plotters! (88/8:30).

Those who belied our signs, we will bring them gradually [to their loss] from where they do not know! I will respite them. My plot is strong! (7:182-183).

Deducing from the Koran, jurists admit the recourse to ruse in order to safeguard the rights of the oppressed and to repel oppression.

Opponents refuse this interpretation considering that these verses concern sarcasm for those who think that they can deceive God.¹

B) Arguments drawn from the Sunnah

A hadith of Muhammad reports that a handicapped man abused a female servant. As he could not bear the penalty of 100 lashes of the whip, Muhammad ordered to give him one lash with a bunch of dates with 100 tips. This hadith is similar to the narration found in the Koran concerning Job. It is the application of the juridical

¹ Ibn-Ibrahim: *Al-hiyal al-fiqhiyyah*, p. 107-109.

rule according to which "norms of the predecessors are our norms unless abrogated."

The opponents consider that the hadith, if it is authentic, reports an exception in favour of the handicapped person in question, and cannot be extended to all. The rule is to stone the one who commits adultery, as did Muhammad with Ibn-Ma'iz. They add that if it is allowed to have recourse to ruse in this domain, the majority of the norms related to sanctions would end up being abolished.

A hadith of Muhammad reports the judgment of Solomon which the Bible speaks of as follows: two women had two babies, one of which had been devoured by a wolf. Each one of them pretended that the devoured baby was that of the other. David attributed the surviving baby to the oldest woman. Consulted, the crafty Solomon gave the order of slashing the baby into two. The young woman, the true mother, told Solomon not to slash the baby into two and to attribute him to the other woman. Solomon then gave the baby to the young woman (Cf. The first book of Kings, chapter 3).

3) Classification of the ruses

Muslim jurists classify ruses into five categories:

A) Obligatory ruse

In this case, it is a question of the legal means followed in order to attain an objective which conforms to law. Thus, in order to acquire the means of subsistence, man has recourse to the sales contract. Similarly, in order to have licit sexual relations with a woman, one has recourse to marriage. Strictly speaking, it is not a question, in this case, of a ruse, but of a means foreseen by law for the realization of a legitimate objective, or even obligatory.

B) Recommended ruse

It is recommended to have recourse to some ruses in order to evade an illicit act or in order to arrive at a licit act. Thus, it is licit to be crafty in order to safeguard private or general good, in order to come to the aid of the oppressed or in order to foil an illicit ruse.

Someone complained to Muhammad about the nuisance caused by his neighbour. Muhammad advised him to throw away his own baggage on the road and to tell the passers-by the mistreatment occasioned by his neighbour. The passers-by started to reprimand the neighbour. The latter, embarrassed, came and pleaded with him to come and put his baggage back into the house, promising him that he will change his attitude.¹

They also cite in this context the words of Muhammad: "War is ruse." During the war, it is allowed to do what is not allowed in other circumstances. Muhammad also said that it was allowed to lie in three cases: when it was a question of reconciling people, in the discussion between spouses and during war.

¹ Hasab-Allah, p. 327.

C) Permitted ruse

It is the ruse that is left to the free choice of a person, namely in matters of repudiation. A husband asked for advice from Abu-Hanifah (d. 767): "I swore to my wife that she will be repudiated if she said a word to me before the rising of the sun, and now she refuses to talk to me even though I do not want to repudiate her. What should I do?" Abu-Hanifah suggested to the man to ask the muezzin to advance the call to prayer which indicates the rising of the sun. Having heard the call to prayer, the wife said to the husband: "Behold the call to prayer, I am henceforth free." The husband informed her then that the call to prayer had been advanced, and that, by consequence, she was not free.

A man had sworn that he would repudiate his wife if he did not kill the Muslim adversary with whom he had picked up a quarrel. A *mufti* advised him to ask his wife to separate herself from him by way of *khul'* (against the payment of a sum of money by the wife), and then marry him. But Ibn-Battah (d. 997) disapproved of this *fatwa*, considering that the woman could have recourse to *khul'* only due to misunderstanding, in accordance with the verse 87/2:229. For him, the man should have rather repudiated his wife. His work on the ruses was edited around this affair.

D) Distasteful ruse

The Koran prescribes that, in case someone repudiates his wife, he can only take her back on condition that the latter be married to another and that their marriage be dissolved: "If he repudiates her, she is not permitted to him until she marries another husband" (87/2:230). The second sanction-marriage serves to make the husband to reflect before embarking on repudiation. In order to avoid disgrace, the husband turns, for a favour, to another man who accepts to marry the repudiated woman and to repudiate her, in his turn, without consummating the marriage, in order for the former to be able to take back his wife. The husband who grants the favour is designated by the nickname of "loaned he-goat." It is around this question that Ibn-Taymiyyah (d. 1328) wrote his book concerning ruses. He rejects such a procedure and considers the two marriages as void. It does not matter here that the marriage of compliancy be agreed upon between the two men or contracted by the second husband in order to render a service to the first, by informing the wife of his plan or without her knowledge. Muslim jurists consider this marriage not only as void, but also as despicable.

In order to avoid annual taxes, a person can make a gift, from part of his property, to his son, a day before the due date, so that the value of what he possesses does not incur taxation.

When a debtor must swear that he does not have money to pay back his debts, he makes a gift of his property to his son and then swears, avoiding thus perjury.

If someone paid a debt, but cannot prove the payment, he can have recourse to false witnesses to sustain his claim, just as he can swear that he never contracted the debt.

A debtor owing a creditor a sum of money and disposing of a surety and denies having it: the debtor can deny the debt in order to make the creditor acknowledge the surety.

Although such ruses are vile, the fact of having recourse to them is not in itself forbidden, according to some jurists. It is considered here that he who has recourse to ruses commits a sin related to means, but not related to the end. The ruses were developed under oppressive regimes which used to impose taxes beyond the capacity of the people and could not guarantee the respect of the rights.¹

E) Forbidden ruse

Ibn-Qayyim Al-Jawziyyah (d. 1351) distinguishes three categories of forbidden ruses:

- Ruses for which the means employed and the sought objective are illicit: if someone kills his mother-in-law, he is answerable to his wife for the offence committed. In order to avoid the law of retaliation, he also kills the wife if he has a minor child with her. And yet, the father is not answerable to his minor son.

A Muslim cannot marry an apostate. Therefore, in order to free herself from the husband it is enough that the woman apostatizes. In order to prevent such a ruse, article 145 of the Kuwaiti code of personal status says: "If the woman apostatizes, the marriage is not dissolved." The explicative memorandum concerning this disposition says:

Complaints have shown that the devil renders beautiful the road to apostasy for the Muslim woman who desires to break the marital bond which displeases her. Because of this, it has been decided that apostasy does not lead to the dissolution of marriage, so as to close this dangerous door, whether the woman apostatized by ruse or not.²

- Ruses whose means are licit, but for which the sought objective is illicit: Islamic law allows the traveller to break the fasting of Ramadan (the breaking of the fasting signifies the possibility of eating, drinking and to have sexual intercourse during daytime). If someone undertakes a journey with the intention of breaking the fasting, he takes advantage of a legal exemption, but with a bad intention.
- Ruses whose means and objective are initially licit, but used for an illicit objective: a man lends some money without stipulating any interest, but organizes himself to obtain from the debtor a gift after the settling of the debt.

4) Technique of ruse

One can deduce from the writings of Muslim jurists different techniques used in ruses. The techniques are considered licit in the measure in which they do not aim at attaining an illicit objective or serve to avoid evil.

¹ Ibn-Ibrahim: *Al-hiyal al-fiqhiyyah*, p. 125-126.

² *Al-Kuwayt al-yum*, no 1070, 23 July 1984, p. 68.

A) *Recourse to allusions (ma'arid)*

The technique finds its legitimacy in the following verse:

There is no blame on you to make allusion of engagement to the women, or to hide in yourselves. God knows that you will be thinking of them. But do not meet them secretly, except to say appropriate words (87/2:235).

The verse permits to announce an engagement through allusions in spite of the period of waiting for the woman whose husband died (*'iddah*). The announcement can be through usage of conditional formulas such as *la'alla*, *'asa* (it is possible).

'Umar (d. 644) said: "In allusions, there is a way of escaping lying."

A man brought to Muhammad the assassin of his brother attached to a rope. He wanted to apply the law of retaliation against him by killing him. Muhammad tried to negotiate his liberation against a payment of a sum of money (*diyyah*). But neither the assassin nor his family had the means to pay. Muhammad then allowed the man to take the assassin with him saying: "If he kills him, he will be like him." The phrase had a double meaning: if he kills him, he will be guilty like him or, if he kills him, he will follow his instinct of revenge. Having realized the double meaning, the man was seized by fear and ended up liberating his assassin.

B) *Saying one thing while thinking of another*

Muhammad said to an old woman that the old do not enter into paradise. As she was sad, he explained to her that his intention was to tell her that the women who enter into paradise become young.

One persecuted by Al-Hallaj (d. 714) recommended his interlocutors to respond to the latter: "We swear by God that we do not know where he is." And within yourself, you are saying that in fact you do not know whether I am sitting or standing. Similarly, whenever someone came to visit him, he would put himself astride over his clothes and would ask his servant to respond: my master is on his horse. This would then induce an error and may indicate that such a person has travelled on his horse. He used to advise him also to stamp the ground with his foot and say: "My master is not here," that is under his foot, but the phrase could be understood as meaning he was not in the place.

A formula was found to describe this situation: "Buying a part of one's religion with the other part." Instead of committing sin through sin, one can have recourse to a diversion contrary to religion yet having an ethical foundation guaranteed by a hadith of Muhammad or, better even, by the Koran.

C) *Making use of words with multiple meanings*

A jealousy woman demanded that her husband swears, before leaving on a journey, that every *jariyah* (servant) he would buy before returning would be free. If the husband's aim was to buy a servant and to be bound to swear according to the demand of the wife, he could do it while knowing in himself that it was a question of *jariyah* in the sense of ship. The fault of the oath falls on the woman because she unjustly constrained him.

Someone is constrained to swear that he owed no one a debt, and that he would walk up to the "House of God" if he was lying. He swears and takes the commitment by insinuating that the "House of God" is not Makka – as in the common meaning of the expression – but whichever mosque.

D) Taking advantage of the ignorance of law

A young man came to Abu-Hanifah (d. 767) and told him that he wanted to marry a woman, but her parents were asking for a very expensive dowry. Abu-Hanifah told him to promise the payment. Once the marriage was concluded, the parents came to claim the dowry. Abu-Hanifah advised the young man to pretend he was travelling abroad with his wife. The wife and her parents were deeply distressed and came to Abu-Hanifah who told them the husband had the right to do so. The parents then told him that they were ready not to claim the dowry. The young man wanted to profit from the situation and insisted, hoping that the parents would give him a sum of money. Abu-Hanifah threatened to tell his wife to say that she owed some money to someone and that she could only depart once she will have paid the debt. The young man renounced his stubbornness pleading with Abu-Hanifah not to inform the parents of the wife.

E) Saving oneself from the scorpion bite

It is the technique aimed at circumventing another ruse. A trickster buys a house and asks for a witness during the sales contract. Then, he goes to his family to fetch the requested sum. Whilst there, he gives up all his property in favour of his son and his wife so that the seller cannot recover the pledged price of the house. In order to avoid such a situation, the seller can either sell the house in the presence of the governor or take him with him so that he can arrest the buyer or even confiscate his property. The trickster-buyer can declare himself bankrupt to avoid being pursued. The seller can then cancel the sales contract by declaring that the object sold was in fact the property of his wife or that it had already been sold to another person of confidence. Ibn-Qayyim Al-Jawziyyah (d. 1351) acknowledges that there is a fraudulent ruse here, but it is allowed to have recourse to it when it is a question of opposing one fraud against another fraud – and not to cause damage. Does the Koran not say: "They plotted a plot, and we plotted a plot, while they do not perceive" (48/27:50).

F) Telling lies

We signalled above that Muhammad allows telling lies in three cases: when it is a question of reconciling people, in a dispute between spouses and during war. It is considered that lying should be avoided if one can attain a licit objective by telling the truth. But if by saying the truth one does not attain a licit objective, telling a lie becomes permitted, even obligatory. Sometimes, a lie is much more recommended than the truth. One should therefore know how to gauge between the lie and the objective to be attained.

III. Dissimulation (taqiyyah)

Dissimulation is a form of ruse widespread in every society, but it is rarely acknowledged. There exist, however, groups which by reason of their persecuted

minority status, have turned dissimulation into a religious dogma and incite their members to have recourse to it. We chose two examples: the Ja'farite Shi'ites and the Druzes.¹

Al-Khomeini says that dissimulation (*taqiyyah*) "consists in a person saying something that is contrary to the reality, undertaking an act contrary to the norms of Islamic law in order to safeguard his blood, his honour or his property."² A Shiite author defines it as being "the fact of protecting oneself from the prejudice of the other by declaring oneself in agreement with what he says or does contrary to the truth."³ The Druze Shaykh Abu-Khzam defines it as being "a preventive behaviour which consists in keeping as a secret the essence of belief and pretending what it is acceptable in order to avoid persecution and danger."⁴

1) Dissimulation among the Ja'farite Shi'ites

A) *The conflict between the Sunnites and the Shi'ites concerning dissimulation*

Sunnites consider Shi'ites as hypocrites because they consider dissimulation as a religious dogma and do have recourse to it. Yet, they say, hypocrisy is condemned by the Koran.⁵ Thus, after citing different hadiths referred to by the Shi'ites (see further below) to justify dissimulation,⁶ a Saudi author says:

These hadiths encourage pretending the contrary of what a person believes. And this is not worthy of a believer, but of the hypocrites of which God says: "When they meet those who believed, they say: 'We believed'. But when they are alone with their Satans, they say: 'We are with you. We are only mocking'" (87/2:14). God describes them as follows: "They say with their mouths what is not in their hearts. God knows best what they conceal" (89/3:167).⁷

Sha't, an Egyptian author, wrote:

Dissimulation constitutes one of the most important dogmas of the Shiites. It signifies flattering, hypocrisy and lying. It enables them to appear contrary to what they are in themselves, misleading simple people by their words.⁸

'Abd-al-Mun'im Al-Nimr, an important Egyptian religious personality, wrote:

Shi'ites practice dissimulation out of fear to appear different from others, which would attract attention... Yet, the adoption of such a principle as a way of life is something that dishonours the group that adopts it, suppresses every trust in its regard and classifies it among the hypocrites... *Imams* of the household of Mu-

¹ For more information on dissimulation, see in particular Al-Khumeini: *Kashf al-asrar*; Al-Khumeini: *Al-makasib al-muharramah*; Al-Ansari: *Al-taqiyyah*; Abu-Khzam: *Islam al-muwahhidin*; Sha't: *Al-shi'ah falsafah wa-tarikh*; *al-taqiyyah fil-fikr al-islami*; Fawzi: *Mafhum al-taqiyyah*; 'Atawi: *Al-taqiyyah*; Al-Lankarani: *Risalah fil-taqiyyah*; Al-Khatib: *Al-harakat al-batiniyyah*; Yassyn: *Al-'aqidah al-durziyyah*; Yassyn: *Bayn al-'aql wal-nabi*; Aldeeb Abu-Sahlieh: *Le secret entre droit and religion*.

² Al-Khumeini: *Kashf al-asrar*, p. 147.

³ Al-Ansari: *Al-taqiyyah*, p. 45.

⁴ Abu-Khzam: *Islam al-muwahhidin*, p. 208.

⁵ The Koran often speaks about hypocrites; chapter 63 is totally dedicated to them.

⁶ See the hadiths further down, under 4.C.

⁷ Al-Jamili: *Badhl al-majhud*, vol. 2, p. 639.

⁸ Sha't: *Al-shi'ah falsafah wa-tarikh*, p. 219.

hammad... are clear of the teachings of the Shi'ites... It is a question in fact of a band which climbs the noble tree of the household of the Muhammad or falsely hides under its shadow in order to put asunder Islam and the Muslims.¹

Sunnites denounce therefore dissimulation, reject its attribution by the Shi'ites to the *imams* and consider the Shi'ites as hypocrites.² The last accusation is refused by the Shi'ites. A Shi'ite work establishes the following distinctions between hypocrisy and dissimulation:

- Dissimulation consists in maintaining faith in the heart, whilst saying the contrary with the tongue out of valid reasons. Hypocrisy on the contrary: consists in maintaining disbelief in the heart and proclaiming faith only with the tongue.
- Dissimulation can only take place under particular conditions, whereas hypocrisy is a sickness for the disbeliever.
- The Koran allows dissimulation, but it forbids hypocrisy.
- Dissimulation is a virtue whereas hypocrisy is a vice.³

It is necessary to know that a Shi'ite reckons that his faith is the only one to be good and considers that of the Sunnites as being false. In appearing to be a Sunnite, the Shi'ite keeps the interior faith, showing outwardly the error; he practices therefore dissimulation and not hypocrisy. The Sunnite, on the contrary, reckons that the Shi'ite is in error, and that only the Sunnite faith is good. By consequence, the Shi'ite who has recourse to dissimulation by appearing to be a Sunnite is a hypocrite.

In order to defend the recourse to dissimulation, Shi'ites have set forth the following arguments:

- Dissimulation is used by every reasonable person, and even by every animal, in order to escape from the danger facing them and to survive. A person who refuses to have recourse to dissimulation shows himself to be stupid and fanatical and places himself at a level lower than that of an animal.
- Dissimulation is among the laws revealed before Muhammad.
- Dissimulation is contained in the Koran and the *Sunnah* of Muhammad and the *imams*. He who denies dissimulation refuses religion and becomes a disbeliever.
- Sunnites who reproach the Shi'ites for having recourse to dissimulation also practice dissimulation.

By consequence, Shi'ites consider that their adversaries condemn them erroneously, and out of the following reasons:

- Ignorance of the meaning of dissimulation and the incapacity of making the distinction between dissimulation and deceit.
- Blind adoption of the positions of classic authors who are hostile to the Shi'ites.
- Insistence on forbidden dissimulation while ignoring the obligatory one.

¹ Al-Nimr: *al-Shi'ah*, particularly, pp. 131-132.

² See Sha't: *Al-shi'ah falsafah wa-tarikh*, p. 220.

³ *Al-taqiyyah fil-fikr al-islami*, p. 122-128.

- Diffusion of lies against Shi'ites.
- Material support from certain quarters which have links with the enemies of Muslims with the objective of diffusing lies and maintaining their own power.¹

Shi'ites add that if they have recourse to dissimulation, it is not their fault, but the fault of Sunnites who have been persecuting them throughout history and have pushed them to dissimulate themselves.² Furthermore, they have no difficulty in proving that dissimulation is foreseen in classic Sunni works although it is dealt with under the title of constraint, which means the same thing.³ They give several examples:

- The son of 'Umar said: "I heard a discourse of Al-Hajjaj and some of his remarks do not suite me. I wanted to change sides, but I remembered the words of the Messenger of God: 'The believer must not demean himself.' I asked him how was that possible. He responded: 'By taking on what he cannot sustain.'"⁴
- Al-Jassas (d. 981) said: "He who refuses to make use of what is permitted destroys himself, according to the majority of the scholars."⁵
- Al-Razi (d. 1209) said: "Dissimulation is allowed for the believer until the day of resurrection because he has the duty of removing danger as much as possible."⁶
- Al-Ghazali (d. 1111) permits lies in order to save a Muslim pursued by an unjust person.⁷ In spite of that, he says that if one comes across a *batini*⁸ and that one thinks that he practices dissimulation, one has the right to kill him, even if he repents.⁹
- Ibn-Qudamah (d. 1223) says: "It is forbidden to pray behind a schismatic or a pervert except for Friday or on a feast day. Nonetheless, if one fears him, one can pray behind him through dissimulation and then re-do the prayer."¹⁰
- Al-Qurtubi (d.1272) said: "Religious scholars are unanimous in saying that he who is constrained to become a disbeliever by a death threat commits no sin."¹¹
- Al-Shawkani (d. 1834) said: "that he who becomes a disbeliever by a death threat does not commit any sin if his heart is at peace in faith. He shall not be separated from his wife and he shall not be condemned for his disbelief."¹²

¹ *Ibid.*, p. 122-128.

² 'Atawi: *Al-taqiyyah*, p. 94-95.

³ See *Al-taqiyyah fil-fikr al-islami*, p. 129-158.

⁴ Al-Haythami: *Kashf al-astar*, vol. 4, p. 112.

⁵ Al-Jassas: *Ahkam al-Qur'an*, vol. 1, p. 127.

⁶ Al-Razi: *Al-tafsir al-kabir*, vol. 8, p. 13.

⁷ Al-Ghazali: *Ihya' 'ulum al-din*, p. vol. 3, p. 137.

⁸ *Batini* is someone who interprets the Koran in an esoteric manner. The term refers to Shi'ites in general.

⁹ Al-Ghazali: *Fada'ih al-batiniyyah*, p. 160.

¹⁰ Ibn-Qudamah: *Al-mughni*, vol. 2, p. 23-29.

¹¹ Al-Qurtubi: *Al-jami' li-ahkam al-Qur'an*, vol. 10, p. 180.

¹² Al-Shawkani: *Fath al-qadir*, vol. 3, p. 197.

We can therefore conclude that both the Shi'ites and the Sunnites know about dissimulation. However, the latter have less need to practice it, being the majority. It should be pointed out here that the Sunni Encyclopaedia of Islamic law of Kuwait dedicates an article to dissimulation.¹

B) Legitimization of the recourse to dissimulation

Shi'ites justify recourse to dissimulation by the fact that it is accepted by laws revealed before Muhammad, the Koran, the *Sunnah* of Muhammad and their *imams*.

a) Dissimulation in the laws revealed before Muhammad

As indicated elsewhere,² the laws revealed before Muhammad remain in force also for the Muslims as long as they have not been abrogated by Islamic law. Yet, according to the Shi'ites, dissimulation was known and practiced by the Jews, according to what the Koran says. Thus, Jacob advised Joseph to keep his dreams secret in order to avoid trouble:

In that time, Joseph said to his father: "O my father! I saw [in a vision], eleven stars, the sun and the moon. I saw them prostrate before me." [His father] said: "O my son! Do not narrate your vision to your brothers lest they plot a plot against you. Satan is for the human a manifest enemy (53/12:4-5).

Joseph practiced ruse in order to keep his brother with him:

When he had provided them with their provisions, he put the cup in his brother's packsaddle. Then an announcer announced: "O caravan! You are thieves." He began by their bags before the bag of his brother. Then he brought it out of his brother's bag. So we plotted for Joseph. It was not for him to take his brother, according to the king's religion, unless God so wished. We raise in degrees whom we wish. Over everyone with knowledge is a knower (53/12:70 and 76).

Abraham feigned to be ill in order to avoid the adoration of the idols and to destroy them:

Then he looked up at the stars, and said: "I am sick." So they departed from him turning their backs. Then he slipped to their gods and said: "Do not eat? Why do you not speak?" Then he slipped unto them hitting with the right hand (56/37:88-93).

A believer of the family of Pharaoh hid his faith:

A believing man of the family of Pharaoh, who hid his faith, said: "Will you kill a man because he says: "My Lord is God," when he came to you with the proofs from your Lord? If he is lying, then his lie is upon him; and if he is truthful, then some of what he is promising you will afflict you (60/40:28).

The Koran says in the story of the sleepers:

So send one of you to the city with this coin of yours, so he can see which food is purest and bring for you provisions from it. Let him be subtle (*li-yatalattaf*) and not let anyone perceive you. If they prevail against you they would stone

¹ Taqiyyah, in *Al-mawsu'ah al-fiqhiyyah*, vol. 13, p. 185-200.

² See Part II, chapter V.

you or force you back to their religion, and then you will never succeed" (69/18:19-20).

Fawzi, a contemporary Shi'ite author, said that dissimulation was indispensable for the success of the prophets:

The main reason behind the success of the movements of the messengers and the prophets was their recourse to dissimulation, that is, working in secret. This is the meaning of the hadith of Imam Al-Sadiq: "Without dissimulation, we would never have adored God." This signifies that without the practice of dissimulation by the prophets and the messengers in their revolution, the tyrants would have exterminated them and brought to an end their messages and by consequence, they would never have adored God.¹

b) Dissimulation in the Koran

Besides the above mentioned verses which speak of dissimulation among preceding peoples, Shi'ites cite the following verses which refer directly to the Muslims:

The believers should not take the disbelievers for allies besides the believers. Whoever does that will have nothing with God, unless you fear them (*illa an tattaqu minhum tuqat*). God warns you of himself. To God is the destination! Say: "Whether you hide what is in your chests or you show it, God knows it. He knows what is in the heavens and on the earth. God is powerful on everything" (89/3:28-29).

It is the only verse where dissimulation is expressly mentioned. Muslim sources mention *taqiyyah* as a variation of the term *tuqat* used in this verse.²

Whoever disbelieved in God after his faith [...], except who was forced while his heart is at rest on account of faith. But he who opened the chest to the disbelief, God's anger will fall on them and they will have a great punishment (70/16:106).

This laconic verse belongs to the first period of Islam. It was revealed regarding 'Ammar Ibn-Yasir who was reassured by this verse after his remorse, caused by the fact that he had been constrained to venerate idols and to insult the Prophet.

Spend in God's way. Do not throw [yourselves] with your hands into perdition (87/2:195).

It is he who elected you. He has not laid upon you in religion any hardship (103/22:78).

Yet, one has recourse to dissimulation only when one is faced with hardships.

The preceding verses allow having recourse to dissimulation. This interpretation is accepted by Shi'ite as well as Sunni commentators. Shi'ites further add the following three verses, interpreted in their manner, to justify dissimulation:

¹ Fawzi: *Maḥmū al-taḥiyyah*, p. 17-18. For more information concerning dissimulation in the laws revealed before Muhammad, see *Al-taḥiyyah fil-fikr al-islami*, p. 33-38; 'Atawi: *Al-taḥiyyah*, p. 33-36.

² 'Atawi: *Al-taḥiyyah*, p. 24.

These will be given their reward twice for what they endured. They repel evil with good, spend from what we provided them (49/28:54).

This verse is understood in the following manner:

These will be given their reward twice for what they endured in dissimulation. They repel evil with good, spend from what we provided them.

The Koran says:

The good deeds and the misdeed are not equal. Repel [the misdeed] with what is better. Then he between whom and you was enmity would be as if he were an ardent ally (61/41:34).

This verse is understood as follows:

Not equal is the dissimulation and the disclosure. You shall resort to dissimulation. Then he between whom and you was enmity would be as if he were an ardent ally.

The Koran says:

O humans! We created you from a male and a female, and we made you peoples and tribes, that you may know each other. The most honourable of you with God, is he who fears [him] the most (*atqakum*). God is knower, aware (106/49:13).

The term (*atqakum*) in this verse signifies who fears [him] the most, but Shi'ites understand it in the sense of who dissimulates the most.

c) Dissimulation in the Sunnah of Muhammad

Shi'ites say that Muhammad had made use of dissimulation. They report from him this hadith: "Seek the gift of discretion in the accomplishment of your affairs." He worked discretely in the diffusion of his mission during the first three years. When he became surer of himself, he received the order to propagate his religion openly:

O messenger! Deliver what was descended to you from your Lord. If you do not do, then you did not deliver his message. God will protect you from the humans. God does not guide the disbelieving people (112/5:67).

So proclaim what you have been commanded and disregard the associators (54/15:94).

In spite of this verse, Muhammad did not hesitate to hide his thought and to cajole his adversaries. It is thus narrated that a man asked Ayshah if he could pay a visit to Muhammad. Muhammad said to Ayshah: "He is the worst of the tribe," but he authorized the entrance. He spoke to him with gentleness. Ayshah was astonished by the conduct of Muhammad who explained to her: "Of course, Ayshah, the worst in God's eyes is the one people leave in peace or cajole in order to avoid evil." In another hadith, Muhammad said that with despicable people, it is necessary to cajole them and put up with their bad character but do the contrary of what they do.

In the story of 'Ammar Ibn-Yasir narrated above, he was persecuted by the polytheists until he accepted to do their will and deny his faith. It was reported to Muhammad that 'Ammar had become a disbeliever. He responded: "No, 'Ammar is

full of faith, from toe to head and faith has penetrated his flesh and blood." 'Ammar came to Muhammad crying. Muhammad wiped away his tears saying: "What is the matter? Should they come back for you, repeat what you told them."¹

The following hadith is reported of Muhammad: "God has discharged my nation of error, oblivion and what constrains it."²

d) Dissimulation in the Sunnah of the Shi'ite imams

Shi'ites report no less than 300 hadiths from their *imams* in order to legitimize recourse to dissimulation as being part of religion, affirming that one does not have recourse to it when necessity demonstrates one's ignorance of religion. We cite here some of the hadiths attributed to Shi'ite *imams*:

Dissimulation is part of my religion and the religion of my ancestors. He who does not practice dissimulation has no religion.

Two men of Kufa were arrested and asked to reject the Emir of believers. One of them did it and was freed, the other refused and was killed. Ja'far commented: "The first who rejected the Emir of the believers knows very well his religion. As for the other one who refused to do it, he was in a hurry to go to Paradise."

If you act by dissimulation, they would do nothing against you. Dissimulation will be your fortress and will serve as a dyke between you and the enemies of God which they will never be able to pierce.

If you say that he who abandons dissimulation is like the one who abandons prayer, you are saying the truth.

Dissimulation is the best of the believer's acts because it serves to safeguard him and to save his brothers from the ungodly.

Dissimulation was authorized in order to safeguard blood. But if dissimulation leads to shedding blood, it has no more essential purpose.

The use of dissimulation in *dar al-taqiyyah* (abode of dissimulation) is a duty. He who swears while lying in order to avoid an injustice against him does not commit perjury and by consequence, he must not offer an expiatory sacrifice.

Protect your religion and hide it through dissimulation, for he who has no religion has no dissimulation. You are among people like bees among birds. If the birds knew what is found inside the bees, they would have eaten them all.

Nine tenth of religion is dissimulation. He who does not practice dissimulation has no religion.³

A Shi'ite author interprets the last hadith in the following manner: nine tenth of humanity is in error and one tenth is in truth. In order to save one's religion, one has to know how to cajole nine tenth of humanity. He bases himself on the Koran

¹ For more information about dissimulation in the attitude of Muhammad and his hadiths, see *Al-taqiyyah fil-fikr al-islam*, p. 46-69.

² Ibn-Hajar: *Fath al-bari*, vol. 5, p. 160-161.

³ These hadiths have been recorded in many works, particularly: *Al-taqiyyah fil-fikr al-islami*, p. 70-92.

which says: "Most humans will not be believer, even though you long [for it]" (53/12:103); "Many of those who mingle abuse each other. Except those who believed and did good deeds, and they are few" (38/38:24).¹

Sunnites contest the attribution of these narrations to the *imams* and consider that they are a pure invention of the Shi'ites.

C) Conditions for the recourse to dissimulation

In order to be able to have recourse to dissimulation, there is need for the fulfilment of the following conditions:

- The existence of a threat to life, physical integrity, honour, property or brothers in religion. Al-Sa'id, an Ibadite jurist, gives the following example: if a disbeliever asks you to affirm that he belongs to a true religion by issuing death threats against you, you have the right to affirm it through the lips whilst denying it in your heart. If he threatens to seize your property, you can also do it if denying him the property he wants to take away from you would lead to death for you or for your family. If on the contrary he threatens to send you to prison or to take a part of your property without there being any danger of death, you have no right to do it.²
- The superiority of the adversary, that is, the latter having the capacity of executing his threats. It matters less in this regard that the adversary be a Muslim or not, of one's own community or not, in a Muslim country or not.
- There is no other means other than dissimulation to escape from danger. If on the contrary one has the choice between living among disbelievers through dissimulation or relocating to another country by keeping one's faith, then one has to choose the latter solution (in accordance with the verse: Those, maybe God will forgive them. God was gratuitous, forgiver, 92/4:99).
- During an inevitable transgression, it is necessary to have the intention to use the permission given by God. Acts in Islam have merit only through the intention. Thus, if you make an act of incredulity by depriving the act of intention of incredulity, you can get away with it. If on the contrary, you take pleasure in transgressing the law, you commit the offence of disbelief, in accordance with the verse: "Whoever disbelieved in God after his faith [...], except who was forced while his heart is at rest on account of faith. But he who opened the chest to the disbelief, God's anger will fall on them and they will have a great punishment" (70/16:106). If it is possible to have recourse to the mental reservation, one should do it. Thus, if you are obliged to insult Muhammad, do it while thinking of another Muhammad.
- One cannot have recourse to dissimulation if that leads to damaging another person, by exposing him to death, adultery or the dispossession of his property.
- Dissimulation cannot bear on an act which is more serious than the threat from which one is trying to escape. Thus, if one is constrained to commit adultery by being threatened to lose one's property, or to bear false witness against an inno-

¹ *Al-taqiyyah fil-fikr al-islami*, p. 75-76.

² Al-Sa'di: *Qamus al-shari'ah*, vol. 13, p. 139.

cent person by being threatened to be denied a job, the constrained person has no right to act.

- Dissimulation must serve the purpose of escaping from a threat. If it does not enable one to be saved from danger, it is not allowed to have recourse to it, because it is unnecessary. Thus, if someone is constrained, while in prison, to apostatize, without any possibility of escaping from the prison, dissimulation is then not allowed.

D) Means of dissimulation

Dissimulation can be manifested either through words or through acts. Al-Tabari (d. 923) only allows the recourse to words. Thus, if one is faced with death threats, he can declare himself a non-Muslim, but one cannot eat pork or meat of a dead animal or drink wine in order to dissimulate one's faith. Muslim jurists consider that such a restrictive interpretation does not correspond to the general terms of the verses: "The believers should not take the disbelievers for allies besides the believers. Whoever does that will have nothing with God, unless you fear them. God warns you of himself. To God is the destination! Say: 'Whether you hide what is in your chests or you show it, God knows it. He knows what is in the heavens and on the earth. God is powerful on everything'" 89/3:28-29.¹ For them, what is allowed to be done out of necessity can also be done by dissimulation. Yet, the Koran allows eating pork and meat of a dead animal out of necessity.²

Dissimulation can have some bearing on an act of allegiance pledged out of fear for one's life or out of the fear that abstention may lead to more harm.

A contemporary Shi'ite work on dissimulation explains that it consists in disguising oneself into a street vender in order to pass unperceived or to occupy a function in an adverse government in order to transmit information and better serve one's religion. He gives in this regard the example of 'Ali Yaqtin to whom the Imam Al-Kadhim (d. 799) had given the order to infiltrate the Abbaside government to the point of occupying a top function similar to the one of the prime minister of the time of the Caliph Harun Al-Rashid (d. 809). In order to better dissimulate his religious affiliation, the *imam* had told him to perform the ablutions in the manner of the Sunnites.³

In order to avoid danger, different means of dissimulation were devised so as to safeguard the freedom of expression.

There is, above all, the recourse to the imagery of the narrative style. It is the case for works where the personalities are animals to which the authors, known or unknown, attribute discourses that are contrary to orthodoxy and to the authorities. The work of *Kalilah wa-Dimnah* of Ibn-al-Muqaffa' (d. 756) can be cited in particular. As a civil servant, he was supposed to convert to Islam, but he used to dissimulate his Manichean religion and frequent circles of literature and people of great wit with free mores and suspected of *zandaqah* (simulating to be Muslims). It is

¹ Hammud: *Al-fawa'id al-bahiyyah*, p. 346-347.

² Al-Sa'di: *Qamus al-shari'ah*, vol. 13, p. 160.

³ Fawzi: *Maflum al-taqiyyah*, p. 90-93.

probably here that one should look for the reason of his death condemnation through a hideous torture. The work in question is a translation or an Arabic adaptation of Indian folk-tales re-written in Persian language. Its narrative style is in form of a lawsuit lodged by animals against human beings, narrated by a famous anonymous work *Rasa'il ikwan al-safa wa-khillan al-wafa* (Epistles of the Brethren of Purity and Loyal Friends).¹

Another form of dissimulation consists in coining a terminology inaccessible to the uninitiated. This is particularly evident among the Druzes (of whom we shall speak later) for whom words lose their usual meaning and acquire meanings not found in the Arabic language dictionary.² Finally, it is necessary to add the development of cryptography of which the Arabs were probably the inventors. The first text on this subject is attributed to the linguist Al-Khalil Ibn-Ahmad Al-Farhidi (d. 786), and the oldest treatise still at our disposal is that of the philosopher Ya'kub Ibn-Ishaq Al-Kindi (d. 873).³

E) Qualification of dissimulation

We said that acts are classified into five categories: obligatory, recommended, permitted, disapproved or forbidden, in accordance with the situation. The same goes for dissimulation.⁴

a) Obligatory dissimulation

Dissimulation is obligatory if it is the only way to stop the incurring of a serious damage to the life of the constrained person, his honour, his property or that of his brothers in faith, on condition that this does not lead to spreading pervasion within religion and in society.

b) Recommended dissimulation

It concerns cases where the damage can take place in the future. Thus, it is recommended to cajole people and to subscribe to their positions. If one does not proceed in this manner, relations with others could lead to enmity and subsequent damage. Cited among the means to cajole through dissimulation are: interacting with the adversaries, visiting their sick, participating in their funerals, praying in their mosques, or being their muezzin.⁵

c) Permitted dissimulation

It concerns the situation where dissimulation and disclosure are of equal value. Thus, if a person is under a death threat because of his faith, he can either have recourse to dissimulation in order to save his life or face martyrdom with the objec-

¹ *Rasa'il ikhwan al-safa*, vol. 2, p. 203-377.

² The editor of *Rasa'il al-hikmah* (a sacred book of the Druzes) gives a succinct list of terms and their meaning which this book employs (*Rasa'il al-hikmah*, p. 20-24). Concerning this means of camouflage, see Yassyn: *Bayn al-'aql wal-nabi*, p. 299-309; Ibn-Khizam: *Islam al-muwahhidin*, p. 157-162; Ibn-Sirin, p. 355-390.

³ The cryptography is said in Arabic: *ta'miyah* (rendering a text blind). The treatise of Al-Kindi and two other treatises on the subject were recorded in Marayati: *Ilm al-ta'miyah*.

⁴ Besides the quotations indicated in the subsequent notes, see *Al-taqiyyah fil-fikr al-islami*, p. 93-108.

⁵ Al-Ansari: *Al-taqiyyah*, p. 46 and 49.

tive of reinforcing Islam. It should be emphasized that the person in question is a simple citizen and not a model for other Muslims. If, on the contrary, he is a distinguished person, he must therefore face martyrdom, because what is allowed for the ordinary believer is not for distinguished believers. Nonetheless, if he considers that there is more interest in staying alive in order to serve the interest of Islam than in dying, he must then have recourse to weighing up the interests and act in consequence.¹

d) Disapproved dissimulation

This concerns situations where it is recommended to have recourse to dissimulation, but without there being a threat, immediately or subsequently. In that case, it is considered recommendable to bear the damage and not to have recourse to dissimulation, in order to avoid creating confusion in the mind of the Shi'ite public.²

e) Forbidden dissimulation

This concerns situations where dissimulation can lead to a greater damage, and its negligence to a greater benefit. The following are some of the situations cited where dissimulation is forbidden:

- Dissimulation bearing an attempt on the life of others: It is forbidden to have recourse to dissimulation if that ends up in an unjust offence against the life of a believer. The blood of a believer being equal for all, a believer cannot have recourse to dissimulation in order to save his own life and at the same time cause the loss of that of the other, even if the latter is ready to die.³
- Dissimulation concerning adultery: If someone is constrained to commit adultery with a woman through a death threat, he should not do it because that constitutes an injustice towards the woman, even if the latter is consenting. If, on the contrary, the woman is constrained to commit adultery under death threat, she can do it because she cannot do otherwise.⁴
- Dissimulation concerning the *fatwa*: It is forbidden to issue a *fatwa* through dissimulation, namely when the one issuing it is a leader of the believers and that he is capable, later, to go back on his *fatwa* which would then remain a wrong reference for the public. It happened that some Shi'ite officials issued some *fatwas* in order to appease threatening rulers, whilst informing their adepts that the *fatwa* in question was a dissimulation. This renders it necessary to examine the *fatwas* issued by the *imams* in order to know which ones should be followed and which ones should be rejected, because they may have been issued as a dissimulation.
- Dissimulation concerning judgments: A judge can be led to issue a judgment that is contrary to religious law, in order to escape from a threat. If the judgment consists in putting to death an innocent Muslim or harm him, the judge cannot have recourse to dissimulation. He has to proceed with the decision even if that

¹ *Ibid.*, p. 46.

² Al-Ansari: *Al-taqiyyah*, p. 48.

³ Al-Sa'di: *Qamus al-shari'ah*, vol. 13, p. 140-141.

⁴ *Ibid.*, p. 141.

exposes him to death. The Koran indicates in this regard that he who judges contrary to the Koran is a disbeliever: "We descended the Torah wherein is guidance and light. By it, the prophets who submitted, as well as the rabbis and the doctors judge the Jews. For to them was entrusted the protection of God's book, and they were witnesses thereto. Therefore do not dread the humans, but dread me. Do not exchange my signs with a small price. Those who do not judge by that which God descended, they are the disbelievers. Do they seek the judgment of [the epoch of] the ignorance? Who is better judge than God for convinced people? You will see those in whose hearts is a sickness hasten to them saying: "We fear lest the [evil] turn of fortune afflicts us." But maybe that God will come up with the conquest or an order from him. Then they will regret what they held secret within themselves" (112/5:44, 50, 52).

- Dissimulation leading to the perversity of religion or society: One cannot have recourse to dissimulation if that can lead to the destruction of religion and to spreading perversity in society. Al-Khomeini gives as an example the fact of destroying all the copies of the Koran, interpreting scriptures in a manner contrary to religion in order to induce people into error, or to destroy the Ka'aba and other important holy places. In fact, dissimulation is done in order to safeguard religion and cannot be used to eliminate it.¹ The same goes for the essential principles of Islam.² With regard to the Shah, Al-Khomeini reckoned that recourse to dissimulation was illicit for religious scholars where it would be allowed for others, because it endangers religion and constitutes complicity with the enemies of Islam.³ For him, dissimulation with regard to political leaders can only take place if it leads to true victory for Islam.⁴
- Unnecessary dissimulation: It is not allowed to have recourse to dissimulation when there is no need. If the threat disappears, dissimulation becomes obsolete. The same goes for one wanting to get rid of a threat by a ruse.
- Dissimulation that does not go beyond the necessary: If you are under death threat for not eating pork, you should not eat more than you are obliged to do.
- Dissimulation in pledging allegiance to the *imam*: A hadith of 'Ali (d. 661) is reported as saying: "You will be led to insult me. Should you fear for your life, do it. But should you be asked to abandon your allegiance to me, then present your necks." It should be considered here that there is no obligation to insult, but that it is simply allowed.

F) Importance of dissimulation

A contemporary Shi'ite work says that dissimulation is a constitutive element of religion due to the following reasons:

- It allows the safeguarding of the individual, property and the community. It is considered charity towards others. It is said in this regard: "Cajoling the enemies of God is one of the best charities towards oneself and towards others."

¹ Al-Khomeini: *Al-makasib al-muharramah*, vol. 2, p. 147.

² Khomeini: *A clarification of questions*, no 2792.

³ Al-Huwaydi: *Iran min al-dakhir*, p. 46-47.

⁴ Al-Khomeini: *Al-hukumah al-islamiyyah*, p. 142.

- It allows resisting the enemy. It is qualified as the shield of the believer. It is not a question of defeatism or cowardice. It is retreating in order to rebound. Thus, one can declare himself a disbeliever in order to save his life and later reintegrate his community in order to fight with it. It is therefore one way of reinforcing religion.
- It allows maintaining the unity of Muslims through good contacts, by interacting with one another. One would go to the funerals, visit the sick and participate in public cults out of dissimulation and thus avoid division and hatred. One can, in this way, convert the enemy into a friend.
- It allows calling to faith. This is the implication of the verse: "Call to the way of your Lord with the wisdom and the good exhortation. Dispute with them with what is best" (70/16:125) and of the verse: "In that time, we took the commitment of the children of Israel... [Treat] with kindness..." (87/2:83).
- It allows for the implementation of the duty of commanding good and forbidding evil: if you adopt an aggressive position towards others who are different from you, you run the risk of weakening the ranks of Muslims; this is not good. On the contrary, if you cajole people, you can save the Muslims; this is good. Because of this, authors of the hadith collections classify those concerned with dissimulation under the rubric "command the good and forbid evil."
- It constitutes obedience to God who says: "Repel the misdeed with what is better" (74/23:96).
- It is meritorious. Fatimah said: "Smiling to a believer leads to paradise; and smiling to an enemy protects from the fire of hell." 'Ali (d. 661) said: "We smile at certain people whilst cursing them in our hearts. It is the enemies of God that we fear in order to safeguard our brothers and ourselves."¹

G) Dissimulation and endurance for the sake of the propagation faith

Islamic law prescribes for a Muslim the propagation of faith and the restoration of situations of injustice, at the risk of one's own life and including through the use of *jihad*. If a Shi'ite pretends to be a Sunnite or a Christian in order to escape from danger, does he not fail in his duty? Does he not show himself to be a coward?

Muslim jurists consider that the propagation of faith and the restoration of justice can be achieved on three levels: either by the hand (by action), or by the tongue (by the words) or through the heart (by dissociating oneself from disbelief and injustice).

The preferred attitude is the one of remaining firm and faithful to oneself and to face the danger. Several verses and narrations affirm this position. Hence, the Koran provides the hadith of the people of Ukhdud who stoically endured the trial of fire (27/85:4-8). Elsewhere, the Koran affirms that faith does not come without trial:

¹ *Al-taqiyyah fil-fikr al-islami*, p. 111-121.

Do humans think that they will be left to say: "We believed!" without being tested? We tested those before them. God knows those who are truthful and knows the liars (85/29:2-3).

Shi'ites consider that the recourse to dissimulation can be in the interest of the community because it allows saving lives and avoiding persecutions which expose the existence of the community to danger. It was narrated in this regard that Fatima reproached 'Ali of being too passive. He answered her: "Do you want this religion to disappear from this world?" She said: "No." He replied: "That is what might happen."¹

2) Dissimulation of doctrine among esoteric groups

A) Aptitude to comprehend

The Koran says:

In that time, God took the commitment of those who were given the book: "Show it to the humans and do not conceal it." But they rejected it behind their back and exchanged it with a small price. How awful is what they exchange! (89/3:187).

It curses those who dissimulate the teachings they received:

Those who conceal the proofs and the guidance that we descended after we made it manifest to the humans in the book, those, God curses them and the cursers curse them (87/2:159).

Muslim jurists qualify as a great sin the fact of monopolizing knowledge and refusing to share it with others. Nonetheless, they consider that religious norms require a certain intellectual aptitude to comprehend them.

Ibn-Rushd (Averroes, d. 1198) classifies people, in terms of religious, law into three classes:

- A class of people who are not in any way men of interpretation. They are people who have a unilateral access to oratory arguments and these constitute the majority of the people.
- The second class is that of men of dialectical interpretation. They are the dialecticians by nature only, or by nature and by habit.
- The third class is that of men sure of interpretation. They are men of demonstration by nature and by art, by that we mean the art of philosophy. This interpretation must not be exposed to the dialecticians, even less so to the ordinary.

He considers that religious teaching must be adapted to the level of the interlocutor:

Exposing someone who is not apt to comprehend any of these interpretations, especially the demonstrative interpretations, far from common knowledge, leads the one to whom it is done and the one who does it to infidelity... The result is

¹ 'Atawi: *Al-taqiyyah*, p. 99.

that true interpretations must not be dealt with in books destined for the common, even more so the untrue.¹

Ibn-Rushd cites here the verse:

Call to the way of your Lord with the wisdom and the good exhortation. Dispute with them with what is best (70/16:125).

It is therefore a duty to keep as a secret some religious teachings for some categories of the population in order not to create confusion in their spirit. Definitely, religious books are at the disposition of everyone and circulate freely, nowadays at least, but the public in general has other preoccupations than reading voluminous treatises. Hence, there is a natural selection in the access to information. It is enough therefore not to disclose the information orally by discussing it with an uninitiated public. There exist, however, esoteric trends which forbid material access to religious teachings.

B) Esoteric trends

There has been, all through history, including in the Muslim world, esoteric groups which reserve their religious and philosophical teachings to a closed circle of the initiated. Muslim authors class them under the collective name of *batini*, that is to say, those who interpret in an esoteric manner the Koran by having recourse to the hidden meaning, a term borrowed from the following verses:

Whatever is in the heavens and on the earth exalted God. He is the mighty, the wise. To him belongs the kingdom of the heavens and the earth. He revives and makes to die. He is powerful on everything. He is the first and the last, the outward (*dhahir*) and the inward (*batin*). He is knower of everything (94/57:1-3).

From this verse, Muslim esoteric trends have sought to comprehend the Koran not in the common sense, but in the allegorical sense, as did before them the Jews in their interpretation of the Bible. As an example, we can cite the interpretations of Philo (d. 54), taken up again by the Church Fathers and the Cabalists. Sunni authors affirm that it was 'Abd-Allah Ibn-Saba (d. v. 660),² a Yemenite rabbi converted to Islam, who introduced this method of interpretation to Muslims, with the objective of dividing and instigating troubles. Thanks to this method of interpretation, supernatural powers and infallibility, and even a part of divinity for some, were assigned to 'Ali (d. 661), the in-law of Muhammad, and to his successors. When 'Ali died, assassinated, Ibn-Saba pretended that the latter was still alive and he would come back at the end of time to establish justice on earth.³ The concept of the infallibility of the *imam* and that of the hidden *imam* are advocated by the Ja'farite Shi'ites, the Isma'ilis, the Druzes, the Nusayris and other groups. And it is these groups that have inscribed the notion of dissimulation in the behaviour of the individual of which we spoke above. Much more, they have dissimulated a part of their doctrine, of which the totality is disclosed only to a certain elite.

¹ Ibn-Rushd: *Traité décisif sur l'accord de la religion and de la philosophie*, p. 25-29.

² For more information on this personality and his movement, see Saqr: *Al-Saba'iyyah*.

³ Al-Khatib: *Al-harakat al-batiniyyah*, p. 20-23.

Classic and contemporary Sunni authors consider that Ja'farite Shi'ites tend to have recourse to the dissimulation of their doctrine with the ultimate objective of destroying Islam. The non-disclosure of the doctrine seems to have been observed by the Shi'ites in the past, as confirmed by this Shi'ite hadith: "You belong to one religion; the one who keeps his secret is ennobled by God, and the one who discloses it is demeaned by God."¹ But today, Shi'ite authors categorically deny it, putting forward the argument that no community has written as much on its proper doctrine and that their books are at the disposition of all and are everywhere, without any distinction.² It is necessary, however, to point out that Sunnites overlook Shi'ite books, rarely available in Sunni countries such as Egypt, where the Shi'ites are not welcome.³ And when Sunnites discover the books, there is an outcry. It is enough in this regard to read the work of 'Abd-al-Mun'im Al-Nimr: *Al-Shi'ah, al-mahdi, al-duruz: tarikh wa-watha'iq*. Obviously, these books contain surprising elements, not to say more, but if Sunnites ignore them, at least nowadays, this is not the fault of the Shi'ites.

Ja'farite Shi'ites practice dissimulation on an individual level, but, at least nowadays, they do not dissimulate their doctrine. However, this is not the case for other groups stemming from Shi'ism, namely the Druzes, who practice these two kinds of dissimulation.

C) Dissimulation among the Druzes

a) Dissimulation of their doctrine

We presented above the religion of the Druzes, considered by other Muslims as apostates.⁴ It is therefore not surprising that the Druzes advocate dissimulation as much on the level of individual attitude as in the diffusion of their doctrine. Their religious authorities refuse to publish their religious sources, hand-copied, or to totally disclose their doctrine in spite of the insistence of the Druzes in diaspora who hope to transmit their religion to their children. Nonetheless, some of their sacred books were seized during the conquest of their mountainous regions in Syria by Ibrahim Pacha (d. 1848) in the 19th century and were later taken into western libraries.⁵ On the other hand, their adversaries proceeded with the publication of *Rasa'il al-hikmah* (Epistles of wisdom), a work composed of 111 epistles constituting the sacred book of the Druzes. However, when they are confronted with these documents, they deny them and distance themselves from them. They forbid their members to write about their religion. Those who do so with the authorization of their religious leaders do not dare to present everything and tend to have recourse to dissimulation in their turn.⁶ The Druze Shaykh Abu-Khzam acknowledges nonetheless that every comprehension of the Druze doctrine is necessarily based on the

¹ Al-Lankarani: *Risalah fil-taqiyyah*, p. 22.

² Hammud: *Al-fawa'id al-bahiyyah*, vol. 2, p. 341.

³ See <http://www.14masom.com/leqaa/47/47.htm>.

⁴ See Part I, chapter II.III.4.

⁵ For a list of these libraries, see Yassyn: *Bayn al-'aql wal-nabi*, p. 22-23.

⁶ Al-Khatib: *Al-harakat al-batiniyyah*, p. 293-301.

Rasa'il al-hikmah,¹ while adding that the text has undergone some alterations and some falsifications in the course of history.²

Among the Druze documents, there exists a small work in form of questions and answers entitled *Catechism of the Druzes*, dating probably way back to the 16th century, which, according to its editor Anwar Yassyn (pseudonym), is found in every village, if not in every Druze home.³ Although destined for the Druze public, the catechism contains interesting elements about dissimulation within this community, elements confirmed by *Rasa'il al-hikmah*. We cite here its most pertinent elements, without commenting:

30 – Question: Why do we deny the other books when we are interrogated?

Response: Know that just as we should hide ourselves under the veil of the Muslim religion, we should acknowledge the book of Muhammad, although it is perfectly licit for us to deny it. We recite, for example, funeral prayers solely by pretension because the Muslim religion demands it.

102 – Question: Why did Hamza recommend us to hide wisdom and not to disclose it?

Response: Because it contains secrets and promises of our Lord Al-Hakim. One should not disclose it to anyone for it contains salvation for souls and life for the spirit.

103 – Question: Are we mean then and do not we want that every person be saved?

Response: That is not being mean, because the time of the call is finished, and the door has been closed since. He who refused to believe shall never believe and he who wanted to believe believed.

111- Question: How should we behave with the Christians and with Muslims?

Response: With the promise that one should write as profession of faith, we have taken the commitment to say: "We adore but God." This is in our hearts and among our brothers the Unitarians. As for the outward and with the polytheists, we should limit ourselves to what our Lord said: "Preserve me in your hearts." And he gave us an example: if someone wears a white, black, red or green robe, his body remains what it is, whether he is healthy or sick. The robe does nothing to it; it does not change the body. That means that the other religions are like robes and yours like the body. Dress what is convenient and pretend ostensibly to be of whatsoever religion you wish and desire.

112 – Question: And when they invite us to participate in the prayer of these religions, is it allowed for us to pray with them?

Response: Whatever confession, there is no harm to pretend, on condition that it be not from deep within oneself. Participate as much as you want, but "preserve me in your hearts."

¹ Abu-Khzam: *Islam al-muwahhidin*, p. 79-80.

² *Ibid.*, p. 83-86.

³ *Catéchisme des druzes*, p. 3-4.

113 – Question: How can we, along with the Muslims, acknowledge Muhammad, and give witness that he is the best of all the creatures and of all the prophets? Is Muhammad really a prophet?

Response: Muhammad is of Arab origin, from the Quraysh. His father was called 'Abd-Allah. He had a daughter called Fatimah, married to 'Ali Ibn-Abu-Talib. Outwardly, we acknowledge him as a prophet for his nation, only by spirit of complaisance. But in our profound thought, we testify that he is a monkey, a demon and an illegitimate son, because he made licit what is not, committed all sorts of debaucheries, made licit for him all women and permitted the adultery and fornication [*sic*]. In his Koran, he says to his nation: "A believing maid is better than an associating woman, even though she astonishes you. Do not give in marriage to the associators until they believe. A believing slave is better than an associator even though he astonishes you" (87/2:221). From where it appears that he made licit the public marriage between men, and between man and woman. Our Lord cursed him in all cycles. The Unitary believer has only to take note of the matter without approving it at all.

114 – Question: How should our conversation be with the people of other confessions? Is it allowed for us to be their companions?

Response: Our Lord Hamza ordered that we hide ourselves as far as possible in matters of religion. Where there are Christians, be with them, and if the Muslims take over, be with the Muslims, because our Lord ordered us saying: "Every confession which triumphs over you, follow it and conserve me in your hearts."

115 – Question: Why are we jubilant in front of Muslims, celebrate the son of the monkey, the devil and the illegitimate son [*sic*] and say: "There is no god but God and Muhammad is his Prophet?"

Response: We are jubilant in front of the hypocrite renegades saying: "There is no god but God and Muhammad is his Prophet," by spirit of complaisance and in order to hide ourselves, but we only celebrate, in so doing, that Muhammad the son of Baha-al-Din Al-Muqtana.

117 – Question: And about the false Messiah of the Christians, how should we collaborate with people of this nation?

Response: Externally, as was recommended for us by our Lord. But interiorly, we say with regard to the Christian nation: "By the Christ of the Christians." They will believe that we take as witness there false Messiah [*sic*]. But, in reality, our discourses are directed to our Lord Salman Al-Farsi.

119 – Question: What can we say about the Metwali Shi'ites, a nation of 'Ali? Is this one a prophet, yes or no?

Response: No, he is not a prophet. But this 'Ali is debauch; he is cursed in his own nation. He cannot be a prophet.

121 – Question: And Moses, son of 'Amran, how do we recognize him as a prophet? Is he, yes or no, a prophet?

Response: He is a very intelligent man and with common sense. He intelligently led his nation because he used to obey the words of our Lord and used to write what he was dictated to. He used to understand what is written for us and to believe in it. His nation was a follower of our Lord. However, he was not a prophet and not at all destined for prophecy. It is allowed to curse his nation, but less as much that of the others.

The catechism ends with a letter of conclusion from which we quote the following three paragraphs:

The catechism was written for all the Unitarians so that they should know and understand how to conduct themselves in matters of religion. In the first place we recommend all the Unitary preachers to preserve the secret of religion and that they submit themselves to its prescriptions; that they do not allow the renegades who do not believe in Al-Hakim and his prophets... understand something of the religion of our Lord, whatever confession they belong to; those who ignore religion and the apostates.

My brothers! Attention! Attention! Attention! Not to fall into imperfection and in the error which consists in the fact that someone else, other than yourselves, understands your religion and what your belief is! Be attentive not to let any polytheist truly understand your religion; and if someone does it, liquidate him. And if you cannot liquidate him, give his name to others and keep this name secret so that you can take it into account under whatever circumstances. This is licit for you.

Beware of him who tells you: "I am a Unitarian." Do not unveil truths of religion to him; for there are many who come to you in a hypocritical manner to know the truths of your religion and the way you express your cult.

The book *Rasa'il al-hikmah* contains different passages encouraging dissimulation which have the same meaning.¹ We cite the following passage:

Hide the epistles from strangers, but do not dissimulate them to those who are worthy. In fact, he who dissimulates them will be accused of infamy and he who discloses them to strangers will be considered impious. You will always be superior to them. For you will always know what they think and what they believe in, whereas they will never manage to know the depth of your thoughts. They will be afflicted by blindness and you, you will see; they will be dumb and you, you will speak; they will be deaf and you, you will listen; they will remain ignorant and you, you will have knowledge.²

The work insists on the obligation to tell the truth and not to lie. Lying is equivocal to disbelief and telling the truth is the synopsis of the Druze religion. Only he who tells the truth will be saved at the end of times. However, the obligation to tell the truth applies to the Druzes alone. With regard to strangers, lying is allowed if the

¹ See *Rasa'il al-hikmah*, 92, p. 230-231; 33, p. 244-245; 42, p. 314 and 322; 98, p. 792; 99, p. 794; 103, p. 809-810; 107, p. 826-828; 111, p. 842. Concerning the analysis of dissimulation in this work, see Ibn-Sirin, p. 305-318; Yassyn: *Bay al-'aql wal-nabi*, p. 279-298; Azzi: *Entre la raison and le Prophète*, p. 184-197.

² *Rasa'il al-hikmah*, no 33, p. 244-245.

Druzes cannot keep silence. If a Druze finds himself in the presence of a stranger and a Druze, he can lie, but as soon as the stranger will be gone, he must inform his coreligionist what he lied about.¹

The Druze doctrine is kept secret thanks to the social structure of the Druze community. The community is divided into two principle categories: the rational (*'uqqal*) and the ignorant (*juhhal*). They congregate in isolated places of worship (called *khuluwat*). The ceremonies that take place therein are divided into three parts. The first part is open to all, after which the ignorant are invited to leave the room. After the end of the second part, the inferior group among the rational is invited to leave the place also. Only the top religious leaders are allowed to know the superior teachings of the Druze religion. An ignorant person can move to the category of the rationals after the age of forty years, if he is admitted by the top religious leaders. The latter have at their top a dignitary called *Shaykh al-'aql* (the chief of reason). Furthermore, as the Druze community is spread out among three States: Syria, Lebanon and Israel, each of these factions has its own religious leader.²

With regard to persecutions, the Druzes put into practice the theory of dissimulation by placing themselves on the side of the victor. This was the case during the creation of the State of Israel, enrolling in the Israeli army and behaving in the most brutal manner against their Palestinian brothers. The call of the Lebanese Druzes to their coreligionists in Israel not to enrol in the army remained dead letters.³ This did not stop Israel from discriminating against them.⁴ During the civil war against Lebanon, the Druzes sided at times with Palestinian factions, at times with Maronites and at times with Shi'ites, according to the fortunes of the army.⁵ Lebanese and Syrian Druze authors insist, on the contrary, on the heroism of their coreligionists in the different wars against colonizers and the Israelis.⁶

b) Questioning dissimulation

All religious communities have always resisted the disclosure of their teachings. We recall here the Englishman William Tyndale who was imprisoned for 500 days before being strangled and burnt at the stake in 1536.⁷ His crime was his translating the Bible into English, the Church was afraid that this was going to push people to put into question its authority. Before dying, he exclaimed: "Lord, open the eyes of the King of England!"

The Druze community is not an exception to the rule, but it will end up adapting itself. The question is at what price?

¹ *Ibid.*, no 41, p. 313-314. For more information on dissimulation and the lies among the Druzes, see De Sacy: *Exposé de la religion des druzes*, vol. 2, p. 651-670.

² Al-Khatib: *Al-harakat al-batiniyyah*, p. 285-292.

³ See <http://www.jcpa.org/jl/vp464.htm>; <http://www.jewishsf.com/bk010907/idruze.shtml>; <http://www.jordanembassyus.org/08202001001.htm>.

⁴ See Gharizi: *Mu'anat al-muwahhidin al-duruz fil-aradi al-muhtallah*.

⁵ Yassyn: *Al-suluk al-durzi*, p. 79-82.

⁶ Abu-Turabi: *Man hum al-muwahhidun*, p. 77-163.

⁷ For more information on this personality, see <http://www.williamtyndale.com/>.

When the Druze 'Abd-Allah Al-Najjar published a popular work entitled *Madhhab al-duruz wal-tawhid* in 1965, Druze religious authorities raised a storm against him, obtained from the Lebanese government the confiscation and the prohibition of the book.¹ The author was assassinated together with his wife in 1976, "for private family reasons," according to Abu-Khzam.² Nonetheless, as the book was already in circulation, Druze authorities organized themselves to publish a book in which they highlighted the errors into which Al-Najjar had fallen. The book was written by Sami Makarim and prefaced by Kamal Jumblat.³ The two authors performed a great feat by not citing a single sacred Druze text, while amassing quotations of Greek and Indian philosophers. Jumblat affirms in his preface that it is necessary to keep the secrecy of religion away from the public eye which cannot succeed in comprehending it and has neither the spiritual aptitude, nor the moral merit nor the will to delve into its knowledge in a sincere manner.⁴ He relies on the authority of an Indian text according to which sacred books should not be placed in the hands of the non-religious because the truth runs the risk of being affected and altered. The non-religious will never manage to comprehend and will start to ridicule it, leading to its perdition. It is therefore necessary to avoid, at all cost, such a catastrophe.⁵ Makarim also insists on the necessity of dissimulating sacred books in order to avoid false interpretations, alterations and incomprehensions on the part of those who ignore spiritual matters. This would be more dangerous than maintaining the secret.⁶

Abu-Khzam, a finer Druze author, but not more convincing, writes in defence of the dissimulation of the Druze doctrine:

The *muwahhidun* religious leaders are proud of practicing dissimulation and consider it as an aspect of fine politeness in their conduct. They recommend one another not to discuss religion among themselves and with others and to respect the particularities of every Muslim group. They are not embarrassed to engage with all the Muslim groups in conformity with their external norms because they consider that there is no fundamental difference between the different groups. They add that it is a question of a noble attitude reflecting the profound wisdom which spares the *muwahhidun* frictions and conflicts with other Muslim brothers through formal questions. They defend this attitude saying that it does not disturb them to conduct themselves with every community in the manner which pleases it, since it is of no use diverging over details when the content is the same.⁷

But can one sincerely say that the content of the doctrine is the same for the Muslims and the Druzes? Contemporary Muslim authors endeavour to prove it, alleging

¹ Decision no. 489 of 2 July 1985.

² Abu-Khzam: *Islam al-muwahhidin*, p. 281, footnote.

³ Makarim: *Adwa' 'ala masalik al-tawhid*.

⁴ *Ibid.*, Jumblat's preface, p. 7.

⁵ *Ibid.*, Jumblat's preface, p. 16.

⁶ *Ibid.*, p. 96.

⁷ Abu-Khzam: *Islam al-muwahhidin*, p. 211.

the Druzes to be a Muslim sect.¹ A *fatwa* by the Azhar of 10 June 1968 follows this line of thought.² It starts with the idea that the Druzes proclaim the formula: "There is no god but God and Muhammad is his Prophet" and observe Muslim duties; consequently, one cannot treat them as non-Muslims. It adds that such an accusation would create division among Muslims. Thanks to this *fatwa*, the Druzes of Lebanon and Syria claim to be Muslims.³ This point of view is not shared by their coreligionists in Israel who affirm in an internet site that the Druze religion is a religion that is independent of Judaism, Christianity and Islam.⁴ This is also the dominant opinion among Muslims. Ibn-Taymiyyah (d. 1328) considers the Druzes as apostates and disbelievers and recommends having them killed, denying them even repentance, due to the fact that they practice dissimulation.⁵ The same opinion is expressed by Ibn-'Abidin (d. 1836),⁶ Muhammad Ras, Muhammad Rashid Rida (d. 1935)⁷ and by the two *fatwas* of Al-Azhar of December 1934 and May 1997.⁸ Anwar Yassyn explains this ambivalent attitude as being due to the fact that the Druzes practice dissimulation towards Muslims in order to safeguard their existence and the Muslims practice dissimulation towards the Druzes in order to bring them back into the fold of Islam.⁹

Given the threats facing the Druzes, who number less than a million, it is less likely that their religious authority foregoes the principle of dissimulation in favour of the immense ocean of Muslims who refuse religious freedom as understood in the West. A Muslim author says in this regard:

It is clear that these people are apostates who have abandoned Islam because they have abandoned the adoration of God and have denied their duties and the laws of Islam. It is indispensable to spread Islam within their ranks and to distance them from their religious leaders who continue to insist on these stupidities and these mythic errors which are a humiliation to human reason. Thus, the scales will drop from the eyes of a great number of those who flounder in the mud without end.¹⁰

The author reproaches publication houses for publishing manuscripts of the esoteric type under the pretext that they belong to a cultural heritage that needs to be safeguarded and that they constitute works of history that need to be protected from

¹ Yassyn: *Al-'aqidah al-durziyyah*, p. 97-100; Yassyn: *Bayn al-'aql wal-nabi*, p. 259-269.

² A *fatwa* published by the Druze periodical *Majallat al-duha*, January 1968, p. 30. It was also published in the Kuwaiti journal *Al-Qabas*, the 2nd October 1983 (see the text in <http://www.alsaha.com/sahat/Forum2/HTML/002983.html>). The *fatwa* does not appear in the Al-Azhar website: <http://www.elazhar.com/Ftawa/Default.asp>.

³ The 1968 *fatwa* of Al-Azhar was cited by the Syrian druze Abu-Turabi: *Man hum al-muwahhidun*, p. 13, and by the Lebanese druze Abu-Khzam: *Islam al-muwahhidin*, p. 282.

⁴ <http://www.geocities.com/Baja/Outback/9277/d1.htm>.

⁵ Ibn-Taymiyyah: *Al-fatawa*, vol. 35, p. 155-162.

⁶ Ibn-'Abidin: *Rad al-muhtar*, vol. 3, p. 297-298.

⁷ Rida: *Fatawa*, vol. 1, p. 276.

⁸ <http://www.elazhar.com/Ftawa/Default.asp?Lang=a&ViewNo=&Action=View&Doc=Doc1&n=3982&StartFrom=3977&Total=11>.

⁹ Yassyn: *Al-'aqidah al-durziyyah*, p. 100.

¹⁰ Al-Khatib: *Al-harakat al-batiniyyah*, p. 317.

disappearance.¹ It is therefore not sure that if the Druzes wanted to publish their sacred books, Muslim countries would allow them, especially if they contain direct attacks against Muhammad and 'Ali (d. 661). Let us point out here that the *Epistles of wisdom* and other books about the Druzes published by their adversaries were done so without the mention of the publication house or under pseudonyms. Here the word attributed to Muhammad takes its full meaning: "He who practices no dissimulation has no head." Understand: "He who does not practice dissimulation risks to lose his head."

IV. Weighing up interests and the choice of priorities

1) Importance of priorities

Belief in God, prayers, marriage, prohibition of theft, cutting off the hand of a thief, the wearing of the veil by the women and the beard by men and the use of tooth-picks constitute obligations which Muslims must respect, because they constitute divine orders, be they rationally justifiable or not. These obligations, however, do not all stand on the same footing of equality and Muslims must know, in relation to the place and time, which of them has priority.

It is in this perspective that jurists deal with exemption, ruse and dissimulation which serve to choose the most appropriate norms. This problem arises in every system of value. Jesus used to reproach religious authorities of his time of giving a tenth of their spices, mint, dill and cumin but neglecting justice, mercy and faithfulness; straining at a gnat and swallowing a camel (Mt 23:23-24).

Sometimes, the choice between the different norms is part of common sense, and it is easy to decide. Thus, if during the hour of prayer someone drowns, it is necessary to postpone the prayer and immediately attempt to save the life of the victim: prayer can wait, but not life. Nonetheless, even on this level, those tied to the letters of the law can have difficulties. A thief in an orthodox Jewish quarter of Jerusalem might take advantage of a Saturday to rob an apartment whose owner is absent, knowing that the neighbour will not use the telephone to call the police.

A question can comprise several parameters, rendering the choice all the more delicate. For this reason, Muslim religious scholars have developed two branches of law called *fiqh al-muwazanat* (jurisprudence of balances) and *fiqh al-awlawiyyat* (jurisprudence of priorities). These branches have acquired more and more importance as much in Muslim countries as in the non-Muslim ones, with growing claims of Muslims to apply religious laws in all aspects of life. As they cannot have everything at the same time, a norm should be determined on which to insist immediately and the other which should be reserved for later battles. By way of comparison, no one can swallow a sausage in one go; one needs to slice it into pieces in order to eat it without getting choked.

We shall rely here on two works of Al-Qaradawi which have been largely diffused and published, several times over: "The jurisprudence of priorities: a new study in the light of the Koran and the *Sunnah*"² and "The priorities of a Muslim movement

¹ *Ibid.*, p. 440.

² Al-Qaradawi: *Fi fiqh al-awlawiyyat*.

in the next step."¹ By 'Muslim movement' Al-Qaradawi means: "organized collective popular action aiming at reinstating Islam in the guidance of society and the guidance of life, the whole of life."² The objective of his first publication was to weigh up the different interests and to classify them by order of priority, starting with the Koran and the *Sunnah*.

2) Everything has its own time

Al-Qaradawi shows that Muhammad, at the beginning of his mission, had forbidden his companions to demolish the idols found around the Ka'aba or to fight, even when they were attacked. It was only when the Muslims became stronger that holy war and the destruction of the idols were prescribed. He cites the verse:

Have you not seen those to whom it was said: "Withhold your hands, perform the prayer and give the purifying [alms]?" When the combat is prescribed for them, a group of them fear the humans as God's fear, or stronger fear, saying: "Our Lord! Why did you prescribe the combat for us? If only you delayed us to one near term!" Say: "The enjoyment of the worldly [life] is little, but the last [life] is better for who feared [God]. You will not be oppressed a whit (92/4:77).

He adds that everything has its own time, and if one acts before time, often one causes damage.³

3) Respecting the priorities

Prescribed obligations in Islamic law must be respected according to the degree of their priority. Al-Qaradawi draws an example from the Koran:

Do you make giving water to pilgrims and visiting the forbidden sanctuary as who believed in God and the last day and struggled in God's way? They are not equal before God. God does not guide the oppressive people. Those who believed, emigrated and struggled with their wealth and their lives in God's way, are far higher in degree with God, and those are the triumphant (113/9:19-20).

This passage establishes the order of obligations for Muslims. It situates belief in God and holy war before watering the pilgrims and the maintenance of the Sacred Mosque. This order of priority is not respected by the Muslims of today, as can be deduced from the following examples:

- Every year, around two millions of Muslims go on pilgrimage to Makka, of whom hardly 15% go for the first time. The rest do it as a repetition and spend enormous sums of money each time instead of making contributions to sustain Muslims at war in Palestine or in Bosnia, to build hospitals or to realize other objectives that are beneficial to the Muslims. Yet, these acts come before the pilgrimage which the Koran prescribes to be accomplished only once in one's life-time, for those who have the means; every repetition is therefore voluntary and superfluous. Some pilgrims prefer to spend money in order to boast that they have gone on pilgrimage, whilst they neglect the obligation to sustain their

¹ Al-Qaradawi: *Awlawiyyat al-harakah al-islamiyyah*.

² *Ibid.*, p. 13.

³ *Ibid.*, p. 36.

parents. Yet, the obligation to sustain one's parents comes before the obligation of going on pilgrimage.

- Some Muslims offer money for the building of mosques in towns which already have some, but they grumble about contributing some money to other objectives which are more beneficial to Muslims, such as the construction of hospitals.¹
- Some Muslims spend more time fighting dismal matters instead of fighting forbidden matters. Thus, they get roused about controversies related to images, hymns and the veil, trying to oblige people to adopt their point of view while paying a blind eye to questions related to the survival of the Muslim nation.²

Through these examples, Al-Qaradawi draws attention to categories of interests which we presented above in chapter III.

4) Priority of quality over quantity

In Islamic law, it is not quantity that should be taken into account, but quality, leaving aside, in so doing, the concept of majority. Virtue is not necessarily found on the side of the greatest number, quite the contrary. The Koran says in this regard:

If you obey most of those who are on the earth, they will misguide you from God's way. They only follow the presumption and do nothing but conjecturing (55/6:116).

If only there had been among the generations before you, some remaining persons prohibiting the corruption on the earth - but a few of them whom we saved. Those who oppressed followed what they enjoyed. They were criminals (52/11:116).

Some, says Al-Qaradawi, are happy to reiterate the hadith of Muhammad: "Marry and multiply because I want to compete with other nations through you." Yet, Muhammad does not boast about the numbers of the ignorant and the pernicious, but about good people who are active and useful. God grants victory not through numbers, but rather through faith and will power. Muslims count more than a billion, but they are humiliated everywhere.

It is also not necessary to be deceived by appearances. The Koran says about the hypocrites: "When you see them, their bodies astonish you (104/63:4). Muhammad said: "A big and fat man presented himself on the day of resurrection, but he did not even have the weight of a wing of a mosquito;" "God does not look at your body and at your shape, but at your hearts."³

5) Priority of knowledge over action

In Islamic law, knowledge comes before action. It is the condition for speaking and acting well. Al-Bukhari (d. 870) entitled a chapter of his collection of the hadiths of Muhammad: "Knowledge before word and action." Al-Qaradawi demonstrates this through two Koranic verses:

¹ See Al-Qaradawi: *Hajatuna ila fiqh al-awlawiyyat*, part one on his website; Al-Qaradawi: *Awlawiyyat al-harakah al-islamiyyah*, p. 39-45; Al-Qaradawi: *Fi fiqh al-awlawiyyat*, p. 16-20.

² Al-Qaradawi: *Fi fiqh al-awlawiyyat*, p. 47.

³ *Ibid.*, p. 41-47.

Know that there is no god but God! Ask forgiveness of your fault, and for the believing men and women (95/47:19).

Among his servants, only the knowers dread God (43/35:28).

In the first verse, knowledge comes before forgiveness and in the second, it leads to the fear of God. The Caliph 'Umar Ibn 'Abd-al-'Aziz (d. 720) used to say: "He who conducts himself without knowledge does more harm than good."¹

6) Priority of convenience over hardship in religion

The Koran encourages convenience:

God wants ease for you, he does not want hardship for you (87/2:185).

God wants to lighten your [burden], for the human was created weak (92/4:28).

In sending Abu-Musa and Mu'adh to Yemen, Muhammad asked them: "Render things convenient and not hard, preach and do not revolt, be obliging." He used to exhort those who used to lead prayer not to prolong it too much, because among those present there were also the elderly, the sick or people with businesses to attend to. Following this concept, Al-Qaradawi says that each time he found himself faced with two diverging juridical opinions, he chose the one that was more convenient.

The exemptions mentioned in the Koran for the sick and the travellers are covered by this vision. In the same perspective, it is necessary to acknowledge that norms change in accordance with time and space. Thus, according to Al-Qaradawi, it is necessary to renounce the classic division of the world between Abode of Islam (*dar al-islam*) and Abode of War (*dar al-harb*), as well as the concept according to which war is the normal condition between Muslims and non-Muslims. These norms are not convenient in our time and there is no sound basis to legitimize them. On the contrary, there are texts which contradict them. For instance, the Koran says:

O humans! We created you from a male and a female, and we made you peoples and tribes, that you may know each other (106/49:13).

It is he who, in the valley of Makka, held back their hands from you and your hands from them, after he had made you triumph on them (111/48:24).

The first verse speaks of recognition and not war. In the second verse, God accords the grace of the end of the battles to the two warring factions.

According to Al-Qaradawi, in the past war was justified by the fact that political leaders of the time used to hinder the preaching of Islam. It was therefore necessary to conquer in order to surmount the obstacle of the propagation of religion. Yet, nowadays there is freedom to propagate religion through different means, without barriers.

In the same perspective of convenience, it is necessary to reintroduce progressively Islamic law. One cannot impose Islamic law instantaneously and suppress the laws inherited from colonialism. In order to achieve this, it is necessary to prepare society mentally and morally and to find alternatives in conformity with Islamic law

¹ *Ibid.*, p. 57-61.

which can replace the currently forbidden institutions. Al-Qaradawi cites the case of the Caliph 'Umar Ibn 'Abd-al-'Aziz (d. 720) who was asked by his son to act instantly in order to put an end to corruption. The Caliph responded: "Do not be in a hurry my son. In the Koran, God criticized wine drinking twice before forbidding it. If I impose the straight path on the people instantaneously, I fear that they abandon it completely and rebel."¹

7) Priority in actions

Priority in actions depends on several criterions:

- Hardship: "the best of God's workers is the one who perseveres, even if he accomplishes little." Because of this, one should not exaggerate in prayer out of fear of getting weary.²
- The interest of the other: in the Koranic passage 113/9:19-20 cited above, the Koran prefers battling to going on pilgrimage because the latter benefits only the pilgrim whereas battling benefits the community. In several hadiths, Muhammad considers the acquisition of knowledge superior to devotion. Because of this, the one who commits himself to devotions is deprived of his share of the legal tax by Muslim jurists, but not the scholar. He who prays, prays for himself, whereas the knowledge of the scholar benefits the community. Among all the actions, the most meritorious is the one that benefits the other. Furthermore, the longer an action lasts the more it is meritorious. Hence the priority of long-lasting charity foundations over occasional alms giving. Muhammad says: "If a man dies, all his actions come to an end except for three: alms that last, beneficial knowledge and a just progeny who prays for him." The person therefore continues to collect the dividends of his actions after his death.³
- The individual obligation (*fard 'ayn*) which a person must accomplish comes before the collective obligation (*fard kifayah*) which is considered accomplished if executed by a sufficient number of people. Thus, taking care of the parents comes before participating in an offensive *jihad*, one undertaken against the enemy found within one's territory. If, on the contrary, the *jihad* is defensive and the Head of State gives the order of availability of everyone in order to wade off the aggression of the enemy, in that case the war becomes an individual obligation and comes before taking care of the parents. Collective obligations vary in importance. Thus, society must collectively ensure providing the competent people it needs in the different domains: religious scholars, jurists, doctors, butchers, etc. If one domain remains unattended to, priority must be given to this domain. Thus, Al-Ghazali (d. 1111) used to reproach his contemporaries of being too preoccupied with *fiqh* while neglecting medicine, to the point of being reduced to dependence on Jewish and Christian doctors.⁴
- The obligation towards human beings comes before laws belonging strictly and exclusively to God. Thus, a Muslim is bound to go on pilgrimage and to pay his

¹ *Ibid.*, p. 83-93.

² *Ibid.*, p. 101-103.

³ *Ibid.*, p. 104-109.

⁴ *Ibid.*, p. 139-141.

debts. He must first pay the debt before going on pilgrimage, unless he is sure he will be in the position to pay the debt on his return from the pilgrimage. The debt even comes before martyrdom. A hadith of Muhammad says: "God forgives the martyr everything except debt." He also said: "If a man dies a martyr and repeatedly comes back to life to die again as a martyr, he shall only enter into paradise once he will have paid his debts." If someone takes a part of the booty to which he is not entitled and dies a martyr, he shall not be considered a martyr and will end up in hell. For example, one day, a man died during a battle; and yet Muhammad refused to pray personally for him, justifying his refusal by the fact that he had unjustly retained the booty which was almost worth nothing.¹

- Rights of the group come before rights of an individual. It is believed that an individual cannot survive without the group. Thus, in the example cited above, when war becomes defensive and the Head of State calls everyone to defend the country, war comes before parents. Children must go to war even if their parents need them and forbid them to go. If Muslims are taken as human shields by the enemy, it is allowed to kill the Muslims in order to defeat the enemy and to safeguard the community. It is the rule of the lesser evil. Similarly, in case of a war, the Head of State can exact taxes besides those prescribed by the religious law and this in order to defend the community.²
- The allegiance to the Muslim community comes before the tribal or individual allegiance. Thus, Muhammad said: "He who gets killed under the banner of a clan, calls for the clan or supports the clan, he is considered to have died during the pre-Islamic period." A Muslim must adhere to the Muslim community and not to separate himself from it. It is reported that Muhammad had ordered someone who had prayed alone in the mosque, not along within the ranks of the community, to redo his prayer. A community should neither fast on its own, even if it has sighted the moon of Ramadan, nor break the Ramadan fasting on its own, even if it has sighted the moon of *Shawwal*. It must fast and break the fasting with the rest of the *ummah*.³

¹ *Ibid.*, p. 142-144.

² *Ibid.*, p. 145-147.

³ *Ibid.*, p. 148-153.

Part IV.

Implementation of Islamic law in time and space

A Muslim is bound, in accordance with his faith, to submit himself to Islamic law. We shall see in this part problems raised by the implementation of Islamic law nowadays, in Muslim countries as well as in the West.

Chapter I.

Implementation of Islamic law in Muslim countries

I. Appropriation of legislative power by the State

1) Codifications of Islamic law and adoption of foreign laws

As we said in the first part, a Muslim State does not have legislative power. But it tried to appropriate itself this power, already during the Ottoman Empire, either through the codification of Islamic law, or by the adoption of foreign laws.

In matters of codification, we can point out notably the promulgation of the *Majallah*, elaborated between 1869 and 1876. The report of the commission responsible for the task gave the reasons for this turnaround: the difficulties of having recourse to juridical texts; lack of competent people in matters of sacred law; divergent opinions within the Hanafite School; changing times; insufficiency of existing laws to encompass all the questions. Shaykh al-Islam, the highest religious authority after the Caliph, believing that the task of the compilation was his, impeded the commission from extending itself to the question of family and succession law. It was only in 1917 that the Ottoman Empire promulgated the code of family law.

It was mainly through the adoption of foreign codes that the Ottoman Empire paradoxically affirmed its legislative sovereignty, relegating Islamic law to the role of a historical law. Thus, the empire promulgated in 1840 the criminal code based on Muslim norms and on modern norms, replaced in 1858 by the French code of 1810. In 1850, it borrowed the French commercial code of 1807. After the end of the Empire in 1924, Turkey leaned even more towards European codes. The criminal code was borrowed from Italy, the commercial code from Germany, the code of civil procedure from Germany and Switzerland and the civil code and the code of obligations from Switzerland. We present some of the reasons put forward by the Minister of Justice, Mahmud Essad, for the adoption of the Swiss code:

- The incomplete character of the *Majallah*. The code contains hardly 300 articles addressing modern needs. The rest "is only an accumulation of rules of law so primitive that they do not fit in at all with the needs" of Turkey.
- Immutability of religious rules on which the *Majallah* is founded: "States whose laws are based on religion become incapable, after a short period of time, of satisfying the needs of the country and of the nation. Because religions express immutable precepts... Religious laws, in the presence of an ever progressing life, are no more than words which are void of any meaning and forms which

have no value. Immutability is a religious dogmatic necessity. Thus, the necessity for religions to be reduced to a simple matter of conscience has become one of the principles of modern civilization and one of the characteristic differences between ancient and modern civilizations."

- Religious laws hinder progress: "Laws which are inspired by religions bind societies and apply them to their original primitive epochs and constitute invincible factors which hinder progress."
- The need to unify law: "For States whose citizens belong to different religions, the duty to break with religion imposes itself even more forcefully; otherwise it would not be possible to edict laws applicable to every group. On the other hand, should it be necessary to create laws for every minority confession, political and social unity of the nation would be untenable."
- The need for the separation between religion and the State: "The particularity of modern laws is the establishment of the separation between laws and religious precepts. Otherwise it would be possible to impose an intolerable tyranny on citizens who professes a religion other than the one adopted by the State... When religion attempts to regulate human societies, it becomes the arbitrary instrument of the sovereigns, the despots and the powerful. By separating the temporal from the spiritual, modern civilization has saved the world from many calamities and has given religion an imperishable enthronement in the conscience of the believers."¹

The appropriation of legislative power is doubled by the appropriation of judicial power. Article 42 of the Treaty of Lausanne of 1923 enounces: "The Turkish Government has decided to take, as regards non-[Muslim] minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities. These measures will be elaborated by special commissions composed of representatives of the Turkish Government and of representatives of each of the minorities concerned in equal number. In case of divergence, the Turkish Government and the Council of the League of Nations will appoint in agreement an umpire chosen from amongst European lawyers."² This signifies in fact the maintenance of community laws and jurisdictions. The situation changed with the promulgation of the law of 8 April 1924 which abolished Muslim religious tribunals. With the adoption of the Swiss civil code, non-Muslim communities gave up their privileges.

The same phenomenon can be observed in other important Muslim countries such as Egypt which depended on the Ottoman Empire and were subjected to its laws. The treaty signed between the empire and foreign powers, and in particular the capitulations, were applicable to Egypt. The negotiations with foreign powers resulted on the 28 June 1875 into the adoption of codes, called mixed: the civil code, the code of commerce, the code of maritime commerce, the code of civil and com-

¹ The text of the statement of the motives is found at the beginning of the Turkish Civil Code, Constantinople, 1928, p. XII-XVI. Concerning the acknowledgement of foreign laws by the Ottoman Empire, see Aldeeb Abu-Sahlieh: *L'impact de la religion*, p. 91-93.

² http://www.lib.byu.edu/index.php/Treaty_of_Lausanne.

mercial procedure, the criminal code and the code of criminal procedure. It is a question of an almost outright adoption of the French legislation with a few alterations. The Convention of Montreux of 1937 fixed a transitional period extending up to 1949 after which Egypt would regain totally its legislative and judicial sovereignty. In the same year, Egypt adopted its famous civil code which was inspired by around twenty Latin codes, Germanic codes and codes said to be independent. Later, the code served as the basis for other codes of Arab countries, replacing in this way the *Majallah*. This was the case for the following countries: Libya, Syria, Iraq, Algeria, Jordan, Kuwait, Qatar, Bahrain, Somalia and the United Arab Emirates. It has also been the basis of the project of the unified civil code of the Arab League and the project of the unified civil code of the Cooperation Council for the Arab States of the Gulf.

It can be noted, however, that the Egyptian civil code does not contain dispositions concerning personal status; this has remained the competence of the different religious communities. These communities had also kept their judicial competences in these domains, each one disposing its own tribunal. Egypt abolished these tribunals through law no. 462 of 1955, but it did not succeed in unifying family law. This is still governed by the particular laws of the 15 different religious communities: one Muslim, four orthodox (Copts, Greeks, Armenians and Syrians), seven catholic (Copts, Greeks, Armenians, Syrians, Maronites, Chaldeans and Latins), one protestant (of several groups) and two Jewish (Karaites and Rabbinites). Other countries, such as Jordan, Syria, Lebanon and Iraq have maintained both the tribunals and the laws of the religious communities.

2) Vestiges of Islamic law

Without wanting to go into the juridical evolution of Arab and Muslim countries, one can say that the juridical system of these countries is principally composed of laws inspired by Western laws, starting with the constitution itself, the civil code, the criminal code, the code of civil and criminal procedure, administrative law, etc., besides these laws, these countries have maintained Muslim norms in the domain of personal status and, for some, also the criminal code, as is the case for Saudi Arabia. Countries which have non-Muslim religious communities have also maintained their laws of the personal status as well as their particular tribunals, with the exception of Egypt. Turkey constitutes the Muslim country which has known the most profound evolution, since it also unified both the tribunals and the laws in this very sensitive domain, by opting for the Swiss civil code.

Islamic law has not as yet lost all its influence in other domains. We limit ourselves here to examining the situation of Egypt:

In matters of civil law, Islamic law appears under four forms:

- Referral: in matters of the establishment of the heirs or their hereditary shares and of the devolution of the property of the estate (article 875) and the wills (article 915).
- Takeover of the institutions mentioned in the previous mixed and indigenous civil codes (by sometimes adding to them some modifications or complements): sale made during a person's last illness (articles 477-478), capacity (articles 44-

49), pre-emption (articles 935-948), payment of the inheritance debts (articles 891-898), donations (article 486-504).

- Introduction of the new Muslim norms not existing in the old codes: theory of abuse of law (articles 4-5), principle of imprevision (article 147 paragraph 2), assignment of debt (articles 315-322), the meeting at which the contract was being framed (article 94), etc.¹
- Islamic law serves as a secondary source, after custom, in order to fill the gap, in accordance with the first article of the Egyptian civil code which states:
 - 1) Provisions of laws govern all matters to which these provisions apply in letter or spirit.
 - 2) In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of Law. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity.

In criminal matters, Egypt promulgated in 1876 the first criminal code and a mixed code of criminal procedure of French inspiration, applied by the mixed tribunals created in Egypt in 1875. The two codes have been the basis of the indigenous criminal code and the indigenous code of criminal procedure of 1883, applied by the indigenous tribunals. The last two were replaced in 1904 by other codes which have taken into consideration, besides the French codes, those of Belgium, Italy, India and Sudan. These codes were replaced in their turn by the criminal code of 1937 and the code of criminal procedure of 1950.

The actual criminal code mentions Islamic law only in two of its articles:

Article 7 – In no case shall the dispositions of the current code undermine individual rights sanctioned by Islamic law.

Article 60 – The dispositions of criminal code do not apply to acts committed out of good will in accordance with the law recognized by Islamic law.

We also need to highlight article 381 of the code of criminal procedure according to which the tribunal must solicit *fatwas* that do not constrict the *Mufti* of the Republic before his pronouncing the death penalty.

However, it is through the constitution that Islamic law plays the most important role. All the constitutions promulgated in Egypt declare that Islam is the religion of the State, with the exception of the provisional constitution of UAR (United Arab Republic) of 1950, by reason of the absence of such a clause in the Syrian constitution.

The disposition appears in article 149 of the first constitution of 1923, and article 138 of the second constitution of 1930. After the revolution of 1952, the disposition was placed at the beginning of the constitution: article 3 of the constitution of 1956; article 5 of the constitution of 1964. Article 2 of the constitution of 1971 goes even farther; it states: "Islam is the religion of the State. Arabic is its official language. The principles of Islamic law are the principle sources for the legisla-

¹ Al-Sanhuri: *Al-wasit fi sharh al-qanun al-madani*, vol. I, p. 65-67.

tion." The last part of the article was modified by the referendum of 22 May 1980 and became: "The principles of Islamic law are the principle sources of the legislation" (*mabadi' al-shari'ah al-islamiyyah al-masdar al-ra'isi lil-tashri'*).¹ In order to understand this constitutional modification there exists the report of the "special commission responsible for the modification of the constitution."²

The modification, says the report, limited itself to adding the definite article to the terms "principle sources." Thus, article 2 "obliges the legislator to turn to the norms of Islamic law and not to turn to other laws, in order to find therein what he needs. If he does not find clear texts in Islamic law, other means of deduction of norms through sources of *ijtihad* in Islamic law enable the legislator to attain the necessary norms without violating the foundation and the general principles of Islamic law."

The report divides Muslim norms into two categories:

- Norms that are definitive in their authenticity and implication (*qat'iyyat al-thubut wal-dalalah*) concerning their source and their intended meaning, not needing any effort of interpretation (*ijtihad*).
- Norms subjected to *ijtihad*, because their sources or their meaning is speculative (*dhanniyyah*). These norms are subject to change in space and time, giving rise to different Muslim schools of thought, or even diverging opinions within the same school. This conferred on Islamic law flexibility and vitality, leading to the claim that Islamic law is good for all times and in every place. Thus, custom and public interests (*al-masalih al-mursalah*) in the legal conditions constitute two important sources of Islamic law; they open the door to interpretation (*ijtihad*) for the deduction of norms conforming to the foundations and to the general principles of Islamic law so as to cope with ideological, social, and economic evolutions of society. The secondary norms (*far'iyyah*) change from one period to another and from one place to another, thus fulfilling the general objectives of (*al-maqasid al-'ammah*) of Islamic law.

The report adds:

The fact of mentioning Islamic law as "the principle source of law" dissipates every doubt that some could have, those who would like to limit the deduction of Muslim norms only to the works of the jurists (*fuqaha'*) of the past, impeding

¹ Other constitutional dispositions refer to religion in general although they don't have the scope of the above-mentioned article. Let us point out in particular the following articles:

Article 9 paragraph 1 – The family is the basis of the society founded on religion, morality and patriotism.

Article 11 – The State shall guarantee the proper coordination between the duties of woman towards the family and her work in the society, considering her equal with man in the fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.

Article 40 – All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed.

Article 46 – The State shall guarantee the freedom of belief and the freedom of practice of religious rites.

² *Ta'dil dustur jumhuriyyat Masr al-'arabiyyah*, p. 24-28.

thus the possibility of finding solutions to new problems and social relations emerging in society which have not been regulated by the said works. This would be contrary to the letter and the spirit of Islamic law, which is a flexible law, providing the general outline and the sources from which norms can be deduced concerning new situations in society.

Aware of the problems that the implementation of Islamic law could pose among non-Muslim Egyptians, the report points out that modification "guarantees religious freedom for non-Muslims among the People of the Book, in accordance with the Koranic principle: "There is no compulsion in religion!" (87/2:256), and guarantees as well equality between Muslim and non-Muslims in rights and duties, in accordance with the principle: "They acquire the same rights as ourselves, they are subjected to the same duties as ourselves." It quotes to this effect articles 40 and 46 of the constitution which mention these rights. It adds that it is "generally accepted that every constitutional text must be interpreted in harmony with other constitutional texts, and not in an independent manner. The same should be the case for article 2 and the other articles of the constitution. Similarly, it is generally accepted that tolerant principles of Islamic law confirm the submission of non-Muslims among the People of the Book, in matters of personal status, to their religious laws."

In line with what precedes, the report concludes:

- 1) There is no doubt that the right to have access to public functions, religious freedom and freedom of worship are among the laws common to the Egyptians, in accordance with the constitution and in conformity with the law, without any distinction concerning sex, origin, language, religion or belief.
- 2) Any erroneous interpretation of the constitution, in violation of the principle of equality and freedom of worship and the cult of the People of the Book living among Muslims, constitutes a flagrant violation of the constitution and of the duty to safeguard national unity, binding for every Egyptian, in conformity with article 60 of the constitution. Similarly, it is contrary to the principles of the referendum accepted by the people on 19 April 1979 in relation to the Treaty of peace and the reconstruction of the State.

One can therefore say that on the formal level Islamic law covers few domains. But in reality it plays an important role in practically all aspects of life. Thus, it serves as the point of reference for the determination of what is licit and what is illicit in the domains of sexual ethics (interaction between men and women, sexual relations outside marriage, etc.) and medical (abortion, artificial insemination, family planning, narcotic addiction, etc.), dress code, food taboos, sports restrictions, restrictions on the artistic level and freedom of expression, economy (interests on loans and bank activities, betting and games of chance, insurances, religious tax, etc.) work for women and their participation in political life, physical integrity (male and female circumcision), etc.

But religious milieus consider that Islamic law must absolutely govern everything, and particularly it must replace laws of Western origin. The mentioning of Islam as religion of the State and of Islamic law as the principle source of law serves as a

lever for them to put into question the reception of these laws and advocate for the return of the implementation of Islamic law. This is what we shall see in the coming point concerning Egypt which serves as reference for other Arab countries.

II. Islamist resistance

1) Refusal of the adoption of foreign laws and the resurgence of Islamic law

The Islamist trend is opposed to any adoption of foreign laws, before as well as after the constitutional modification. According to this trend, every law whose source is other than Islamic law is void.

This restrictive opinion is based on several Koranic verses, among which the following two passages:

Those who do not judge by that which God descended, they are the disbelievers... the oppressors... the perverse (112/5:44, 45, 47).

It is not for a believer man or woman, when God and his messenger have decided upon a matter, to claim freedom of choice in their matter: whoever disobeys God and his messenger is manifestly misguided (90/33:36).¹

This trend already appeared in the debates which took place during the drafting of the Egyptian civil code. Al-Hudaybi (d. 1973), a guide of Muslim Brothers, says:

I would like to mention here that I have an opinion on this whole question and not just on the matters of civil law. This opinion is an immutable belief and I hope I will meet with God without having to change it. I was not opposed to civil law neither orally nor through the press and I have said nothing in what concerns its content, for I am of the opinion that it should not be discussed [...]. My belief is that legislation, in all our countries and in what concerns our life, must be based on Koranic norms. And when I say the Koran, I also embrace the *Sunnah* of the Messenger, peace and prayers be upon him, for obeying him is obeying God.²

'Odeh, a judge and member of the Muslim Brothers, condemned to death in 1954 by Jamal 'Abd-al-Nasser (d. 1970), writes: "The Egyptian Constitution, positive law, proclaims that the official religion of the State is Islam. This means that the Islamic system is the basic system of the State; that Islam is the source from which flows the State system." Every law contrary to Islam, he says, is contrary to the constitution, and tribunals have the right not to apply it.³

Islamists consider Islamic law as a divine law, a perfect law, above every other law. The adoption of a foreign law signifies in fact challenging the perfection of Islamic law and its capacity to govern the society of our time. A student asked a question to the Saudi Commission for the *fatwa* to know if the comparison between Islamic law and positive law would lower the standing of Islamic law. The commission responded that there is nothing wrong with such a comparison if the objective is to demonstrate the complete character of Islamic law and its supremacy over

¹ 'Odeh: *Al-islam wa-awda'una al-qanuniyyah*, p. 56-57.

² *Majmu'at al-a'mal al-tahdiriyyah*, vol. I, p. 48.

³ 'Odeh: *Al-islam wa-awda'uni al-qanuniyyah*, p. 63-64.

positive laws.¹ In the website of the Islamic Academy of *fiqh* which depends on the Muslim World League (*Rabitat al-'alam al-islami*), we can read among its objectives: "demonstrate the superiority of Muslim norms over the norms of positive laws."² This only reflects the hadith of Muhammad according to which "Islam has elevated itself and nothing shall be elevated above it."

The sacralisation of Islamic law is, however, problematic: what should be retained from this law? Islamists hope that current Muslim norms in force in Muslim countries will be maintained and reinforced. That is the case for the domain of family law and its restrictions which are contrary to human rights: prohibition of the marriage of a Muslim woman with a non-Muslim, inequality in matters of succession between a man and a woman, etc. Furthermore, Islamists would like to see the current criminal code suppressed, in order to replace it with an Islamic criminal code comprising norms contrary to the tendency towards the humanization of sanctions and respect for religious liberty: cutting off the hand of the thief, stoning for the offence of adultery, implementation of the law of retaliation in case of aggravated assault, condemnation to death for the apostate, etc. On the other hand, they hope to forbid the current banking system and establish an Islamic banking system. But the list of Muslim norms to be rehabilitated runs the risk of being even longer: prohibition of work for the women, prohibition of music and cinema, destroying of statues, imposition of *jizyah* (tribute) on the non-Muslims and the exclusion of the latter from the parliament. Why not the return to slavery? The question has remained open.

Shaykh Salah Abu-Isma'il, an Egyptian parliamentarian, defends the return to slavery for women adversaries who fall into the hands of the Muslims as prisoners. He explains that Muslims can decide in this case either to liberate them with or without compensation, to kill them, or to reduce them to the state of captured slaves. Should she be reduced to this state, she becomes the property of the man in accordance with the norms of Islamic law and her master has the right to wait until after her menstruation in order to be sure that she was not impregnated by another man. Once he is assured that she is not pregnant, he has the right to live with her like husband and wife. Should the slave give birth to a child and if the man dies, she will be inherited by her son as part of property. But as the mother cannot be possessed by the son, the captive regains her freedom.³

Al-Mawdudi (d. 1979), the great Pakistani religious scholar, also defends slavery. Replying to an author who denies slavery in Islam, he says: "Is the honourable author capable of pointing out a single Koranic norm which suppresses slavery in an absolute manner for the future? The response is without any doubt no."⁴

The above mentioned proves that in the minds of their authors the abolition of slavery is a provisional measure and that they envisage reintroducing it. A work by an Egyptian does not hide its fear with regard to this perspective. Going back to

¹ *Majallat al-buhuth al-islamiyyah*, no. 27, 1990, p. 89-90.

² <http://www.muslimworldleague.org/>.

³ Abu-Isma'il: *Al-shahadah*, p. 78-79.

⁴ Abu-Isma'il: *Al-shahadah*, p. 78-79.

slavery is an eventuality that should not be excluded if one day the fundamentalist Muslim milieu comes back to power.¹

An Egyptian professor, doctor in law at the Sorbonne, proposes a project of law in conformity with Islamic law which should replace the Geneva Convention. This project specifies in its article 202:

They will not be taking into consideration the customs or the international laws in the military domain if they are contrary to the objectives of Islamic law (*maqasid al-shari'ah*) or violate any of its texts.

The project distinguishes between a country which has been conquered without war in accordance with the peace treaty and a country that has been conquered following a war (article 165).

If a country is conquered without war, its inhabitants who possess a revealed Book (*ahl al-kitab*) have a choice between paying *jizyah* (tribute) or double the amount of *zakat* (religious tax) should they be reluctant to pay *jizyah*. As for those who do not have a revealed Book, the Head of State is free to treat them as *ahl al-kitab* or to give them the choice between Islam and death (article 169 and pp. 134-135). The inhabitants of the conquered country are free to remain in the country or to abandon it (article 174).

The project further cites the prisoners of war:

Article 191 – The Head of State has the right to offer freedom to the prisoners of war, to ask for ransom from the conquered country against their liberation (*fida'*) or to reduce them to slavery (*yadrib 'alayhim al-riq*).

Article 192 – The ransom for the liberation of the prisoners or their subjugation is part of the booty. The ransom or the subjugated prisoners are distributed to the beneficiaries of the booty.

Concerning the non-combatants, the project specifies:

Article 52 – 1) It is forbidden to kill women, children, the old and the monks.

2) Should it be reckoned they constitute a support for the enemy, it will suffice to take them as captives (*sabiyhim*).

3) If it is impossible to take them as captives, they will be treated as combatants.

It is a question in fact of treating them as slaves who are part of the booty and can be distributed according to the Muslim norms (article 179ff.). Concerning women captives, the proposition of the law enounces:

Article 194 – 1) He who receives a woman captive as a booty, it will be forbidden for him to have sexual intercourse with her immediately.

2) If she is not pregnant, it is only forbidden to have sexual intercourse with her if she has had her menstruation only once. If she is pregnant, sexual intercourse can only take place after the delivery and the period of purification (*nafas*).

Article 195 – He who receives a captive woman as part of the booty is allowed to have pleasure with her except for sexual intercourse.

¹ Masri: *Khalf al-hijab*, p. 105-112.

The proposition of the law does not specify whether the women of every conquered country shall be considered captives or only those of the countries conquered after war.

These few references show that, should there be need, the demand for the return to Islamic law is flexible and can always reserve surprises for us. After all, who has the right to determine what element is part of Islamic law and what is not, and what part of the law should be applied and which one to be abandoned? The response to such questions depends on the powers in place and the possibilities of putting into practice ideas inherited from the past. The intemperance of the Taliban in Afghanistan provides a living example.

2) Refusal of the implementation of foreign laws

The opposition to the laws of foreign origin manifests itself sometimes through the refusal, by some Islamist judges, to apply State laws, disputing their constitutionality.

The judge Mahmud 'Abd-al-Hamid Ghurab is an illustration of the conflict which exists between positive law and Islamic law. In 1986, he published a work of 455 pages, entitled *Ahkam islamiyyah idanah lil-qawanin al-wad'iyyah* (Islamic rulings; a condemnation of positive law). The work contains a selection of 37 rulings made by Ghurab between 22 February 1979 and 18 May 1985, with intervals of favourable or hostile reactions from the Egyptian and foreign media. The work ends with a conclusion and an appeal to the Egyptian judges to fight for the application of Islamic law in Egypt. He considers the fact of rendering justice in line with Muslim norms to be the noblest form of *jihad*. He cites to this effect the words of Muhammad: "The best *jihad* is saying the truth before an iniquitous governor." *Jihad* of the pen, he adds, is equivalent, and even superior, to the *jihad* of the sword. In his preface, 'Ali Jarishah affirms that the judges, like the rest of the State personnel, have the right and even the duty of abstaining themselves from applying laws that are contrary to the laws of God, for the following reasons:

- The constitution which renders Islamic law to be the principle source of law concerns all State organs;
- The Koran says: "Therefore judge between them by what God descended and do not follow their desires (112/5:48).
- The profession of faith (*shahadah*), first pillar of Islam, affirms that "there is no God but God."¹

3) Position of the constitutional court

The Egyptian Supreme Court, created in 1969, and the constitutional Supreme Court which replaced it from 1979 onwards repeatedly looked into the question of the implementation of Islamic law in the court appeals related to the constitutionality of laws contrary to Islamic law.

¹ Ghurab, p. 11-13. For more details, see Aldeeb Abu-Sahlieh: *Le juge Ghurab assis entre deux chaises*.

Through the decision of 3 April 1976, the Supreme Court affirmed that article 2 of the constitution aims at exhorting the legislator to be inspired in his work by the principles of Islamic law, without imposing on him any specific school of jurisdiction or any particular opinion. If the legislator opts for a particular solution, he can impose it on all in order to guarantee the stability of the relations and to attain justice. Obedience to public authority (*waliy al-amr*) in that case is obligatory for all, as long as it does not violate the divine law and does not command sin (*ma'siyah*).¹

In a great number of cases, the court refused to pronounce itself on the constitutionality of the laws in relation to article 2 when there was no interest. In a trial relative to article 226 of the civil code on the interests, the plaintiff renounced reclaiming the interests. The court decided then that it was no longer necessary to pronounce itself over the constitutionality of the article in question.²

The article, however, was the object of another decision of the court. It affirms a number of principles:

- Only the constitutional Supreme Court has the judicial competence to control the constitutionality of laws, by virtue of article 175 of the constitution and article 25 of the law which governs the court in question.
- Recalling the work of the parliamentary commission which had presented the constitutional amendment, the court affirms "the necessity of revising laws existing before the constitution of 1971 in order to make them conform to the norms of Islamic law," but "the transition from the present legal order existing in Egypt for over 100 years to complete legal Muslim order requires patience and practice investigation by reason of "economic and social changes which were not common or known before, the novelty of our modern world and the relations and transactions in the international community." "It is necessary to leave enough time for those who have the responsibility of modifying the juridical order to collect the laws in a complete manner within the framework of the Koran, the *Sunnah* and the opinions of the different jurists and scholars."
- Article 2 of the constitution highlighted the limits to be respected by the legislative power, namely the necessity to refer to the principles of Islamic law when establishing a given law. This limit concerns only the new laws promulgated after the constitutional amendment. If this limit is not respected, the law would be unconstitutional. This does not concern the laws promulgated before the constitutional amendment, which still remain in force and must be applied.
- Constitutional modification does not mean that Muslim norms have become applicable laws in themselves, without the need for being promulgated, and that they abrogate all the contrary laws. The tribunals cannot apply Islamic law as such. Such a concept would imply not only the rejection of laws governing the different civil, penal, social and economic aspects, but also the search by the tribunals of non-codified norms to be applied to disputes posed instead of and in

¹ Decision of the Supreme Court on 3rd April 1976, Collection of the decisions of the said court, vol. I, tome I, p. 432-434.

² Decision of the court on 21st December 1985, Collection of the decisions of the said court, vol. 3, p. 287.

the place of abrogated laws. This would lead to the diminution of the value of the judgments and destabilization of order.

- The legislator has a political responsibility, and not a juridical one, of purifying the laws promulgated before the constitutional amendment of all that would be contrary to Islamic law, so as to create harmony between all the laws and their conformity to the law.
- Article 226 on the interests was promulgated before the amendment of the constitution. Without pronouncing itself on the conformity, or the lack of it, to Islamic law, the article in question cannot be considered contrary to the constitution.¹

In a ruling of 5 January 1991, the court was to pronounce itself on the constitutionality of the articles 267, 269, 273, 274, 275, 276 and 277 of the criminal code related to sexual offences. It affirmed that only the legislations promulgated after the modification of article 2 of the Constitution are unconstitutional if they violate Islamic law. It added: "The decisions taken by this Court have absolute authority not only in what concerns the parties involved in a dispute that has been resolved, but also concerns everyone and imposes itself on the entire authority of the State, whether the Court decided upon the constitutionality or the unconstitutionality of the undermined norm." Yet, says the Court, the undermined articles have already been declared as conforming to the constitution, provided they entered into force before the constitutional modification of 1980. It was therefore not necessary to come back to this question.²

In what concerns the laws that intervened after the constitutional modification of 1980, the court had recourse to the distinction between definitive Islamic principles and speculative rules. Whereas the first are immutable, the second vary according to time and space. In order for a law promulgated after 1980 to be declared unconstitutional, it must be contradicted by norms of Islamic law whose origin and significance are certain (*ahkam shar'iyah qat'iyyat al-thubut wal-dalalah*), norms which cannot be subjected to interpretation. If, on the contrary, a norm is uncertain, concerning its origin and/or its meaning, it can be subjected to interpretation, this being the competence of State authorities. The fact that any of these norms have been existing for a long time does not constitute an obstacle to its replacement by a new norm, if the interest of society demands it.

Thus, the court rendered a judgment on 14 August 1994 concerning a demand for divorce by a woman on the basis of law 100 of 1985. According to this law, every man who contracts a marriage must indicate his status in the contract of marriage. If he is already married, the official of the marriage must inform the first spouse about the new marriage of her husband. The latter then has the right to ask for a divorce within a year, with effect from the day of the notification, on condition that

¹ Decision of the court on 4 May 1985, Collection of the decisions of the said court, vol. 3, p. 209-224. The court used the same arguments in a judgment about the same subject in its decision of 21st December 1985, *op. cit.*, p. 274-286.

² A decision published in the Egyptian official Journal no. 20 of 16 May 1991, reproduced in *Majallat hay'at qadaya al-dawlah*, no. 1, 1992, p. 134-137.

she be able to prove the existence of an offence. A bigamous husband, from whom the wife was asking for a divorce on this basis, raised the question of the unconstitutionality of the law in violation of article 2 of the constitution, insisting that the condition posed by this law restricted his right to have several wives. The court rejected his request considering that the Koran only allows polygamy, but it does not render it obligatory. Polygamy is therefore not an obligation, but a simple faculty subordinated, moreover, to the guarantee that the wives be treated in a just and fair manner. Yet, the law does not forbid polygamy, that would be contrary to Islamic law, but it only bases itself on objective principles, taking into consideration the material and moral suffering of the first wife, which would make impossible the assurance of a decent life among the wives. The burden of the proof weighs on the woman and the judge has the right to pronounce the divorce only if he does not succeed in reconciling the two parties. This disposition does not bear any harm on the right to polygamy.

In another case of 18 May 1996, the court pointed out that the decision 113 completed by the decision 208 of 1994 barring pupils wearing a complete veil from entering schools and subjecting the wearing of a partial veil to a written demand from the legal guardian of the pupil does not violate article 2 of the constitution. The court started by saying that Islam had intervened in order to elevate the standing of the woman and to encourage the protection of her chastity. By consequence, the woman is not free to wear what she likes. However, the court added that there does not exist any absolute text, in its origin and significance, covering in detail the clothes a woman should wear in order to cover parts of her body which are obligatory for her to veil. Although there are texts in the Koran concerning the veil, their significance is relative, as Koranic verses on this question have given rise to divergences of interpretation. The legislator can then legislate in this domain on condition that he does not contradict any absolute principle of Islamic law. In so doing, one should not exaggerate and expose the woman to discomfort by considering the whole of her body as shameful (*'awrah*). The woman must study, go out and meet others and it is not imaginable that, while life is vibrating around her, it be imposed on her to be "a ghost wrapped in black or any other colour." Her clothes must protect her virtue, without for that matter hampering her movements. It is necessary to strike the balance between the two. By forbidding the wearing of the complete veil in public schools, concludes the court, the legislator did not therefore contravene the principles of Islamic law.¹

4) Tentatives of codification

Not having had the chance to see tribunals massively challenge positive laws in force, Islamists have endeavoured to circumvent the problem by supporting the adoption of projects of laws which are in conformity with Islamic law. Here below we present the Egyptian projects, the project of the Arab League and the projects of the constitutions prepared by Islamist movements.

¹ For more information on the stand of the court, see Bernard-Maugiron: *Le politique à l'épreuve du judiciaire*, p. 339-395.

A) Egyptian projects

Egypt has known several projects of law in view of the Islamisation of law. The most important are those of 1982.

In conformity with article 2 of the constitution, the Parliament decided on 17 December 1978 to form a special commission authorized to "consult all the studies and works of codification and laws relative to the application of Islamic law, in Egypt and abroad, as well as the works of the experts and specialists of Islamic law and positive law." The opinions of Al-Azhar, some associations and the Supreme Court were sought.

Contributed to the work of the commission and some sub-commissions: university scholars, the Shaykh of Al-Azhar, the *Mufti* of the Republic, some members of the Islamic academy of researchers, some Ministers of Justice and of *waqf*, the top magistrates (the president of the Supreme Court and the State Council, the prosecutor, the president of the Court of Appeal, etc.), rectors of universities, deans of faculties of law and faculties of *Shari'ah* from Al-Azhar and other universities. The projects thus adopted could pretend to benefit from an optimal consensus.

The task resulted in a series of projects of law. In presenting these projects to the Egyptian Parliament, its president, Sufi Abu-Talib, explains:

The fact of applying Islamic law and being submitted to its legal statutes, signifies that the Egyptian people and the entire Arab and Islamic world are brought back to their Arab and Muslim inner self, after the alienation that we lived through in the shadows of foreign laws over one century. This puts an end to the contradiction between moral values of our land and the civilizational barrier which engulfs our people [...], between what the Egyptian man believes and the laws that govern him.¹

One of these projects is that of the Muslim Civil Code, modelled on the Egyptian Civil Code. The work of the commission consisted in revising this code and analysing, article by article, what would be contrary to Islamic law. But the most important project from the point of view of Islamisation is the one of the criminal code. This project is composed of 630 articles, followed by an imposing explicative memorandum. It re-introduced notably offences mentioned in the Koran or the *Sunnah*, namely stealing, robbery, adultery, false accusation against adultery, consumption of alcohol, apostasy, harm to physical integrity and human life. For these offences, the project foresees penalties termed Islamic, namely: death penalty, amputation of the hand and the foot, lashing, stoning, the implementation of the law of retaliation (eye for an eye, tooth for tooth, testicle for testicle, etc.) and the blood price.²

In spite of the work that was required by the elaboration of these projects, the Egyptian government side-lined them, making no reference to them in the Parliament, probably due to reasons related to foreign policy. It should be pointed out

¹ *Iqtirah bi-mashru' qanun bi-isdar qanun al-'uqubat*, p. f.

² Concerning the content of this project, see Aldeeb Abu-Sahlieh: *Étude sur le droit pénal musulman*.

here that penalties mentioned in the project of the criminal code clashed with the principles of human rights as mentioned in the different documents of the United Nations. Yet, the peace treaty between Egypt and Israel of 26 March 1979 explains in article 3, number 3: "The Parties ... will guarantee the mutual enjoyment by citizens of the due process of law. The process by which they undertake to achieve such a relationship parallel to the implementation of other provisions of this Treaty is set out in the annexed protocol (Annex III)." The annex specifies in article 7: "The Parties affirm their commitment to respect and observe human rights and fundamental freedoms for all, and they will promote these rights and freedoms in accordance with the United Nations Charter."¹ This could have motivated the withdrawal of the projects.

Muhammad Sa'id Al-'Ashmawi justifies the withdrawal by the fact that Sadat had invited him, after the publication of his work *Usul al-shari'ah* (Principles of Islamic law, of which we shall speak later), to ask him to explain the difference between *fiqh* and *Shari'ah*. He then renounced the project which was supposed to consecrate the *Shari'ah*, whereas in reality they were only codifying the *fiqh*.²

B) Projects of the League of Arab States

The League of Arab States endeavoured to unify the law of its members in conformity with Islamic law. In their first meeting held in Rabat from 14 to 16 December 1977, 16 Arab ministers of justice published a *Manifesto* in which they affirmed their will to work towards the unification of the laws of their countries.³ The first paragraph of the *Manifesto* is a declaration of faith:

Convinced of the fact that the unity, the glory and the prestige of the Arab World, as well as its force, its authenticity and the true union, common to all the people and the societies of which it is composed have for foundation the *Shari'ah*, by which God has gratified the Arab World, in terms of belief and law which consolidate its components, organize its thought and coordinate its drive towards the fulfilment of its aspirations and the concretization of its ideal of unity and dignity.

In the second paragraph, it is said that "the observation of the precepts of the *Shari'ah* is the most sound path and the best adapted" for attaining the unification of law as "an imperative objective to attain." The paragraph adds that "these principles of *Shari'ah* (*mabadi'*) which mix [...] harmoniously all aspects of life as well as rules and the jurisprudence that comprise the Muslim thought and legislation have been and remain the point of reference for scholars and researchers of every Arab Nation, not to say the entire world."

The Plan of Sana'a (25 February 1981), adopted by the Council of Arab Ministers of Justice, says that the unification must preserve the following fundamental principles:

¹ <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-Egypt+Peace+Treaty.htm>.

² <http://www.rezgar.com/debat/show.art.asp?aid=17234>.

³ French text of the *Manifest of Rabat* in *Recueil de documents du Conseil*, vol. 1, January 1987, p. 13-15.

a) Taking as source of unified legislation: the Sacred Koran, the *Sunnah* as well as the rules of interpretation attached to them such as consensus, analogy or public interest, avoiding being influenced by any particular rite of *fiqh* and adopting the principles of justice which are not in contradiction with the *Shari'ah*.

b) Adopting the rule of progression in the procedure of unification.¹

The Council met every year, since 1983. Several projects and conventions were elaborated.

- The Arab Convention of Riyadh on judicial cooperation.
- The Statute of Casablanca for the unified Arab judicial organization.
- The Arab convention of Amman on commercial arbitration.
- The project of unified law in relation to land.
- The project of the unification of juridical terminology in relation to civil procedure, arbitration and execution of judgments.
- The project of the unified civil code.
- The project of the code of criminal procedure.
- The project of the code of civil procedure.
- The document of Kuwait in relation to the unified Arab code of personal status.
- The project of unified Arab criminal code.

It is the last two projects which pose more problems.

The project of personal status concerns only the Muslim community. It takes up the discriminatory norms with regard to non-Muslims which exist in the current laws of Arab countries. Nothing is said about the laws of different non-Muslim communities, ones which are supposed to remain in force where they exist.²

As for the project of the unified criminal code, it re-introduces, like the above-mentioned Egyptian project, Muslim norms discarded a long time ago in several Arab countries.³

C) Constitutional projects of Islamist movements

It is evident that Islamist movements expect to seize power in different Muslim countries in order to establish regimes that apply Islamic law in all the domains of life, instead and in place of laws borrowed from the West, not only on a local level, but also on the level of international relations. Some of these movements have already drafted the constitutions which should govern the countries they will take over, and foresee even the rehabilitation of holy war (*jihad*) as a means of expanding and propagating the Islamic faith. I translated and published six of these projects.⁴ We already spoke, above, about the project of the Egyptian professor of law

¹ French text of the *Plan of Sana'a* in *Recueil de documents du Conseil*, vol. 1, January 1987, p. 17-19.

² Text in <http://www.carjj.org/node/250>.

³ Text in <http://www.carjj.org/node/237>.

⁴ *Projets de constitutions et droits de l'homme islamiques*.

lecturing in Qatar who was supposed to supplant the Geneva Conventions, but in which it was a question of the payment of the tribute by the conquered, the subjugation and distribution of the women as slaves among the combatants, and this in conformity with classic Islamic law.

Muslim constitutional projects all agree in denying the sovereignty of the people and in affirming that sovereignty belongs to Islamic law, or rather to God as author of law.

Article 20 of the project of the Liberation Party declares: "Sovereignty belongs to Islamic law and not to the people." The commentary explains that individuals and the nation are subjected to Islamic law. Thus, contrary to democratic regimes, the Caliph as Head of State is appointed by the nation to apply not his own will, but the Koran and the *Sunnah* of Muhammad. If people abandon Islamic law, the Caliph is bound to fight them and make them come back to faith. The project cites here verse 92/4:65: "No! By your Lord! They will not believe until they make you judge in what they litigate with each other, do not find in themselves any blame from what you decided, and submit completely," as well as the narration of Muhammad: "None of you becomes a believer unless when his desire conforms to the message that I brought."

This specific project stipulates that the norms adopted by the Head of State must be deduced from Muslim sources (article 41). The Head of State "cannot forbid what is allowed or allow what is forbidden" by Islamic law (article 42). At the most, he can opt for one among the different Muslim solutions which he can impose on all (article 2). He does not have, on the contrary, the power to modify fixed norms such as those relative to cult or dogma (article 3).

One finds practically the same norms in other projects, even though they are formulated differently. Let us cite two models. The project of Jarishah says:

Article 1 – Islam is the religion of the State; its dogmas must be safeguarded; its law is obligatory and its legitimacy is above any other text; the principle source of this law is revelation – the Koran and the *Sunnah*; all that is contrary to this law is rejected and null.

Article 3 – Authority draws its legitimacy from the application of God's Law and the acceptance of the Muslim community. It has the right to obedience, support and protection of its existence as long as it obeys God and his Apostle Muhammad.

Article 49 – Revelation – as much the Koran as the *Sunnah* – is above the constitution, and it is to be referred to for everything that is contrary to it or all that over which this constitutional declaration has kept silence.

This concept can be summarized by article 15 of the project of Wasfi:

Expressing an opinion in conformity with Islamic law is a duty guaranteed by the State. The latter facilitates all the necessary means to this effect.

The opinion of the majority is not taken into account if such an opinion is contrary to Islamic law.

5) The tactic of priorities

We exposed above the theory of priorities. The theory finds its application in the process of the Islamisation of society and of law. Aware of the difficulty to favour the adoption of Islamic law, Al-Qaradawi considers that there are priorities to be respected on this level:

- Priority must be given to the conversion of the individual. Society can only change if the individuals of which it is composed change. The Koran says:

God does not change the statement of people until they change what is in themselves (96/13:11).

It is therefore necessary to bring up sound individuals who are strong in faith, because faith is what will guide them in life. It is also necessary to watch over them intellectually through education, spiritually through devotion, characterily through virtues, physically through sports, socially through participation and militarily through fitness whilst keeping the balance between all of these. Thus, will be created virtuous men capable of indicating the good to others as said by the Koran:

The human is in perdition. Except those who believed, did good deeds, enjoined on each other the truth and enjoined on each other the endurance (13/103:2-3).

Education comes before *jihad*. Because of this, the Koran starts by instructing Muslims, before prescribing war for the diffusion of faith. War is further divided into four categories: war against oneself, war against Satan, war against the disbelievers and war against the hypocrites.¹

- Priority of ideological battle over juridical battle: in order to reform society, and therefore to lead it towards the integral application of Islamic law, it is necessary to engage an ideological battle as much on the external arena with the atheists, the missionaries and the orientalist who attack the Muslim religion and culture, as within the interior of the arena with trends which believe in legends of faith, innovative devotions, adoption of a sclerotic attitude in thought, making of no concessions in politics or rejection of society by having recourse to violence due to religious rigidity and impatience in the implementation of Islamic law. Al-Qaradawi considers that too much importance was given to the juridical aspect by claiming the implementation of religious norms, notably in the penal domain. Without denying that the norms are part of Islamic law, he considers that the insistence on the norms does a disservice to the cause of those who claim the return to Islamic law and offers the opportunity to the enemies of Islam. What builds up the nation is education, and afterwards come the laws as a protection.²

III. Opposition of the liberals

Faced with Islamist movements, liberal Muslim authors try to resist by bringing forth counter-responses to the arguments of the Islamists and by attacking the foundations of Islamic law. But contrary to works on this discipline, the writings of

¹ Al-Qaradawi: *Fi fiqh al-awlawiyyat*, p. 209-219.

² *Ibid.*, p. 220-230.

the liberals are practically not taught in faculties of law or those of Islamic law. Their authors are often subjected to attacks by Islamists and some have even lost their lives because of their ideas. We shall endeavour to present, as examples, the ideas of some of these authors.

1) Muhammad Sa'id Al-'Ashmawi

Al-'Ashmawi was an Egyptian Supreme Court judge and former head of the State Security Court. He is author of several works two of which are of particular interest to us: *Usul al-shari'ah* (Principles of Islamic law), and *Al-islam al-siyasi* (Political Islam). The last one has been the object of partial translation into French under the title: *L'islamisme contre l'Islam* (Islamism against Islam). Placed under police protection by Sadat since 1980; the protection was suspended in 2004. Because of this, he lives cloistered in his house out of fear of the Islamists.¹

The author makes a distinction between *Shari'ah* and *fiqh*. The *Shari'ah* indicates what had been revealed to Muhammad, whereas the *fiqh* is Islamic law such as what has been developed by the Muslim jurists through the centuries. Only the *Shari'ah* must be taken into consideration, and not the *fiqh*, which remains a product of human effort.

He also makes a distinction between the *Shari'ah* of Moses and that of Muhammad. Moses was nicknamed the "legislator" due to the legislative character of three of the five books attributed to him. Muhammad, on the contrary, had an essential mission of moral order, and only secondarily did his mission have a juridical dimension. He cites, for support, Muhammad who says: "I am the Prophet of mercy," and "I was sent to perfect moral virtues." The term mercy and its derivatives appears 79 times in the Koran, against four occurrences only of the term *Shari'ah* and its derivatives. Among the six thousand verses of the Koran, hardly seven hundred contain legal prescriptions, either in matters of cultic practices, or in matters of relations among men. If we limit ourselves to the last ones, we only find two hundred, that is one thirtieth of the Koran, and if we leave aside the two hundred verses which have been abrogated by later revelations, there remain no more than eighty which are still in force.

Al-'Ashmawi points out that the term *Shari'ah*, mentioned once in the Koran: "Then we put you on a path of the order. Therefore follow it and do not follow the desires of those who do not know" (65/45:18), signifies not law, but a method and a way. It was only afterwards that the term was perverted by the Muslim jurists to make of it a synonym of the law as conceived in the Jewish system. They thus established codes in the manner of the Talmud, by neglecting the difference between the mission of Muhammad and that of Moses.²

Al-'Ashmawi rejects the argument of the Islamists who say that only God can settle the disagreements among men. In the first place, he says, the rules of law of divine origin appearing in the Koran are insufficiently numerous and insufficiently precise

¹ <http://www.rezgar.com/debat/show.art.asp?aid=17234>.

² Al-'Ashmawi: *Al-islam al-siyasi*, p. 35-37.

to allow for a reconciliation of these disagreements. On the other hand, the Islamists misunderstand the two verses which they cite, namely:

No! By your Lord! They will not believe until they make you judge in what they litigate with each other, do not find in themselves any blame from what you decided, and submit completely (92/4:65).

It is we who descended to you the book with the truth, so that you judge between the humans with what God showed you (92/4:105).

In these two verses, God addresses himself to the Prophet and to him alone. The first denies the quality of belief to the Muslims who would call upon Muhammad to be the arbiter in their disagreements, or those who would contest his ruling. No surprise: the Prophet, memory of the revelation, must be the only arbiter of the disagreements arising from within the society of the first believers, so as to guarantee its stability. One cannot say, even so, that he loses the quality of a believer he who would not submit, by his own will, to another man, as learned and as highly placed as he may be, in what concerns the regulation of his matters. This consists of a strange abuse of power which indicates that its author has no idea whatsoever of matters of justice and, more seriously, attributes himself a competence that God expressly reserved to the Prophet. The second verse is also clearly explicit: God is addressing himself only to the Prophet, and no being endowed with reason can pretend possessing the vision that God declares having bestowed upon Muhammad.¹

As for verses 112/5:44-48: "Those who do not judge by that which God descended" are "disbelievers," the "unjust," and the "wicked," they were revealed when the Jews of Medina, after having asked the Prophet to arbitrate in a matter of fornication concerning one of their own, they exposed to him the penalty of stoning foreseen by the Jewish law for such cases. The People of the Book are therefore the only addressees of these verses.²

Following the example of the interpretation mentioned above, Al-'Ashmawi would like Koranic verses to be interpreted in a manner that takes into account the circumstances of their revelation (*asbab al-nuzul*), avoiding the extrapolation that would falsify the meaning. He rejects to this effect the juridical rule created by the Muslim jurists according to which "the general meaning of a Koranic term must prevail over its circumstantial meaning."³

On the other hand, it is necessary to take into account the circumstantial character of the Koranic norms. Al-'Ashmawi cites to this effect several practices in support: modification of the Koranic norms by 'Umar (d. 644) in matters of succession; prohibition of temporary marriage by 'Umar, though mentioned in the verse "Preserved women, except what your right hands possess. God's book [prescribed] it for you! It is permitted to you to seek beyond that, with your wealth, preserving [them], not as debauchees. Then give them their wage for what you enjoyed with them, as imposition. There is no blame on you for what you accepted mutually,

¹ *Ibid.*, p. 39-41.

² *Ibid.*, p. 41-42.

³ *Ibid.*, p. 42-44.

after [payment of] imposition. God was knower, wise" 92/4:24; creation of other forms of repudiation; implementation of the penalty against consumption of alcohol. More recently, the prohibition of slavery and the introduction of the obligatory inheritance rule in succession law, to make up for the principle of non-representation.¹ As long as the circumstances of life will keep on changing, the norms mentioned in the Koran will remain subject to change. It is therefore absurd to say nowadays that he who does not implement the juridical norms becomes a disbeliever. Such an affirmation is but an incitement to revolt.²

Al-'Ashmawi also attacks the political aspect of the call of the return to Islamic law. There is no single Koranic verse which indicates to the Muslims the political regime to adopt. If the Caliphate was an integral part of the Muslim dogma, the Koran would have regulated it, at the very least it would have marked out the directives for such a government. Pharaonic Egypt experienced theocracy through the infallibility of the Pharaoh. Today still, the theory exists in Japan. In the Middle-Ages, it was a question of monarchic sovereignty of the divine law. Yet, this is contrary to Islam. But Muslim jurists, under the Byzantine influence, developed such a political theory in order to legitimize the power of Mu'awiyah (d. 680) and his successors.³

Before Mu'awiyah, political power was not a religious one, emanating from God, but a civil power, ensuing from human will. The governor was for them an individual like any other person. During his investiture, Abu-Bakr (d. 634) made the following discourse in front of the believers: "I was designated your leader, but I am in no way better than you: if I conduct myself well, help me, and if I conduct myself badly, correct me;" under the same circumstances his successor, 'Umar (d. 644), declared: "If you note in me whatever deviation, correct me." Later, the Caliphs diverted from this teaching and they became theocrats.⁴

Al-'Ashmawi considers that according to Islam all the political regimes are social regimes based on historical factors. It is simply necessary that these regimes ensue from the will of the people and progress according to the needs of society and the spirit of the time, on condition that this takes place within the framework of the Muslim norms of justice, equality, mercy and humanity. The true Muslim government, next to the authority of Muhammad, is the government chosen and controlled by the people in all liberty, with the right to change without the shedding of blood and without being accused of atheism or disbelief.⁵

Dwelling on the principle claims of the Islamist, namely the implementation of Islamic penal law, Al-'Ashmawi says: "Several conditions must be fulfilled in order for the Koranic penalties to be applied. What is more important is that we should have before us a community of pious and honourable believers, practicing political,

¹ According to this principle, if the deceased leaves behind a son and children of a son who died before, the inheritance is attributed to the living son and nothing is given to the children of the son who died before.

² Al-'Ashmawi: *Al-islam al-siyasi*, p. 45-51; 198-204; Al-'Ashmawi: *Usul al-shari'ah*, p. 98-110.

³ Al-'Ashmawi: *Al-islam al-siyasi*, p. 88-91.

⁴ *Ibid.*, p. 135-136.

⁵ *Ibid.*, p. 88.

economic and social justice, such that judgments delivered in the name of the religious law would not be used for objectives foreign to it, and that the chastisements imposed in the name of Islam are not applied to the Muslims by unjust governments or by special courts, on the basis of arbitrary arrests or false witnessing, as was often the case throughout the Muslim history, even more so nowadays." Islam does not ask society to systematically apply the Koranic chastisements, but on the contrary, it enjoins them to show tolerance and clemency. Thus, Muhammad said: "Strive to be clement with one another in the implementation of Koranic chastisements." Each time that society, through tolerance, avoids the implementation of the Koranic chastisement, it conducts itself in conformity with the spirit of Islam and the recommendation of its Prophet. The same rule requires that when the judge is faced with a crime deserving legal punishment, he must avoid the implementation of the penalty, if there is any form of doubt surrounding the facts, the testimonies, the victim or the author of the crime, in conformity with the hadith: "Avoid the implementation of the legal penalty in case of doubt." As for the law of retaliation (an eye for an eye) mentioned in the Bible, it was introduced into Islamic law by the jurists on the basis of the adage: "The law of our predecessors is valid for us, with the exception of what has been abrogated." Yet, jurists who postulated this adage use it in a selective manner: they ignore in this instance numerous previous prescriptions which have not been abrogated – for example that of the death sentence for him who strikes his parents.¹

Bank interests constitute the warhorse for the Islamists. For Al-'Ashmawi, the prohibition of interests in the Koran signifies no other than a prohibition that was stipulated in articles 226 and 227 of the Egyptian civil code. Koranic verses were revealed during a period different from ours, where money had a different value and the relations were different. Society during the time of Muhammad was rural. Today, there is an exploitation that is much greater than interests, flowing particularly from the world economic system, and this is what should be fought.²

As for the banks termed "Islamic," there is nothing revolutionary about them: so far they have only developed some juridical artifices, thanks to the revenue of the capital called henceforth *murabaha* (a sale followed by a repurchase at a higher price), and *ta'wid* (indemnification). Moreover, these banks do not look for productive investments, but they speculate in the European and American markets and give to the depositors but a part of the profits realized. Another ploy for disguising the nature of the dividends they give to the depositors consists in modifying each year the rates, so that they do not appear to be interests. All these subterfuges allow them to drain considerable sums which, far from serving the interests of the Muslim community, damage it, in the measure in which these funds, instead of being put to the service of development, end up in the occidental financial market.³

Al-'Ashmawi denounces the perversion of the meaning given to Islamic law. The perversion comes from "Muslim countries which affirm the implementation of

¹ *Ibid.*, p. 182-185.

² *Ibid.*, p. 110-116.

³ *Ibid.*, p. 66-67.

Shari'ah and govern according to divine revelation, and which, for some, materially and morally support the trend of political Islam." These countries, however, are far from the spirit of Islam.

At the heart of *Shari'ah* there is the idea that the patrimony of the Muslim community is its property, and that it disposed of it through the intermediary of representatives and in conformity with what it considers to be its interests. The idea that the government can be the sole proprietor of the public resources and that it can, alone or with its neighbours, freely dispose of it, is absolutely contrary to the *Shari'ah*. Has it ever happened that the amputation of the hand was applied to a rich man or someone important in the countries that pretend to apply the *Shari'ah*? Yet, a hadith says: "Truly, your predecessors perished because they allowed the rich to steal while they chastised the poor." What is the most important thing for the Muslim community: ordinary theft or misappropriation of State property or the payment of millions of dollars or dinars of commissions? The Imam Malik (d. 795) thinks that, in contrast to other *fiqh* masters, the stealing of public property should be subjected to Koranic penalties. But it is only in Egypt that the opinion of Malik can be evoked.¹

Responding to those who reproach Egypt for having adopted a foreign law instead of Islamic law, Al-'Ashmawi says:

If by the infidelity of the Egyptian law one means the fact that it was borrowed from the French law, one shows an ignorance and a fanaticism that is equally detrimental to Islam. In reality, the Egyptian law only borrowed the form of the French law. Its essential solutions are exactly the same as those postulated by the different schools of *fiqh*. The Muslim civilization multiplied the borrowings from the civilizations that preceded it without the Muslims ever considering these borrowings as impious. The Koran itself did not avoid drawing norms from a common patrimony of civilization each time it found them good enough for the Muslim community [...]. If the Koran did not deprive itself of borrowing the "pagan" laws, why should the borrowing of laws from Christian countries for solutions to non-religious questions which do not contravene the *Shari'ah*, because it is technically more satisfactory to do so, be considered infidelity?²

2) Fu'ad Zakariyya

Zakariyya is an Egyptian professor of philosophy, of the left-wing, who dwelled for a long time on the question of the implementation of Islamic law. He has often been the object of attacks from the Islamists. We rely here on two of his works: *Al-haqiqah wal-wahm fil-harakah al-islamiyyah al-mu'asirah* (Truth and illusion in the contemporary Muslim movement) and *Al-sahwah al-islamiyyah fi mizan al-'aql* (Islamic uprising under the scrutiny of reason). A French translation of some of the chapters of these two works and an article from the periodical *Al-Fikr* by the same author was published in Paris in 1991 under the title *Laïcité ou islamisme: les Arabes à l'heure du choix* (Secularism or Islamism: Arabs in time of choice).

¹ *Ibid.*, p. 64-65.

² *Ibid.*, p. 51-52.

The author is astonished to see that the Iranian and the Sudanese experiences, and before that the Saudi, Pakistani and Libyan ones, did not lead the Islamists, particularly the Egyptians, to review their ideas. In all these experiences, the result was the same: regimes far from liberty, justice and equality, and in opposition to all the values which religions and philosophies try to realize since immemorial times. How can one in this case entrust one's destiny to movements which do not take into account the experiences of others?¹ Some try to say that the Sudanese experience is a bad one! But how is it that Muslim Brothers in Egypt and in Sudan applauded the application of Islamic law under Numeiri? After his downfall, those who had applauded it kept silence or changed their opinion looking for excuses. Islamists always cite the example of 'Umar (d. 644), and that is enough to prove that they do not find any other examples across the fourteen centuries apart from this example, a rare phenomenon and which never repeated itself due to the exceptional character of this Caliph. What to do, since all the experiences in history have failed? How can one in this case hope that the period of 'Umar (d. 644) repeats itself?²

Zakariyya is also astonished that Muslim movements concentrate their claims on the formal aspects, such as the dress code, separation of sexes, the beard, or even the implementation of penal law, but they forget about justice and say nothing about the unequal distribution of wealth in countries such as Saudi Arabia which pretend to implement Islamic law, or on military alliances which are contrary to the interest of Islam. This is the reason why Saudi Arabia finances Islamist movements in Egypt as long as they limit themselves to formal aspects and do not venture into acts of justice and equity. It mobilizes Islam in order to safeguard the interests of Western countries which exploit the Arabs, instead of exploiting its wealth in favour of Islam. Because of this, the Muslim movements will never pose a real threat to the West as long as they do not concern themselves with the question of justice and equality. Quite the contrary, these movements serve the interests of the West due to the fact that they bring to heel democratic movements in Arab countries, favouring a degrading and bigoted spirit of the intellect.³ Never have the Islamist movements established a program in view of social equality, equitable distribution of the wealth resulting from oil and its use for helping poorer Muslim countries. Have they ever criticized the reckless expenditure of rich Muslims of the wealth which will be needed by future generations?⁴

The Islamist group *Al-Jihad*, responsible for the assassination of Sadat, according to Zakariyya, offers a concrete example of the implementation of the formal character of the claims of the Islamists. According to the different declarations of its members in the tribunal, the assassination of Sadat was not motivated by the signing of the peace treaty with Israel (as some thought), or by the social injustice which characterized his reign. He was reproached for having refused to implement Islamic law, ridiculing the women's veil which he called a "tent," modifying the code of personal status, being democratic, democracy being considered by them as

¹ Zakariyya: *Al-haqiqah wal-wahm*, p. 5-7.

² *Ibid.*, p. 171-175.

³ *Ibid.*, p. 25-26; 75-83; 138.

⁴ Zakariyya: *Al-sahwah al-islamiyyah*, p. 25.

being contrary to Islam since that would signify that the representatives of the people can legislate without necessarily referring themselves to the Book of God.¹

Islamist movements put forward, as part of the arguments for the implementation of Islamic law, the fact that this law is of divine origin, in opposition to positive law which is of human origin. They add that the current situation is the result of the implementation of the positive law. According to Zakariyya, such a presentation of matters is attractive, but is false. For, in reality, norms of Islamic law which can be considered divine are too few and to be able to apply them there would still be a need of human participation, which leaves room for all sorts of diverging interpretations. Thus, the principle of charity prescribed by the Koran, how can it be applied as such? And how can the principle of *shura* (consultation), mentioned in verses 89/3:159: "It is by mercy from God that you were lenient to them! Had you been rough, hard-hearted, they would have dispersed from around you. So forgive them, and ask forgiveness for them. Consult them about the affair. Once you are resolved, confide in God. God loves those who confide" and 62/42:38: "those who answered the call of their Lord, performed the prayer, [conducted] their affair by consultation among themselves, and spend of what we provided them" be applied? Such a principle was interpreted by Khalid Muhammad Khalid as implying parliamentarism, multipartism and freedom of press. But Muslim trends are far from accepting such an interpretation. By deducing that *shura* is equivalent to democracy in the modern sense of the term, Khalid did not deduce that from the text, but rather from his own knowledge and his current experience. The text existed for fourteen centuries, how is it that it has never been understood in the modern sense of democracy? In fact, Khalid behaves in exactly the same way as those who search in the Koranic verses for all sorts of sciences. *A posteriori*, if at least they had discovered such sciences before others did so, they would be credible. But, *a posteriori*, they exert a sterile effort which leads nowhere. If you put the *Shari'ah* into the hands of retrogressive people, they will see in it what their souls inspire them to see.²

Islamists want an implementation of the penal law which aims at punishing those who commit offences. Zakariyya asks himself whether one should not rather start with the positive aspect of Islamic law. Will the penal law put an end to all the problems of development, unemployment, poverty and famine? On the other hand, how can one implement Muslim penalties in current situations? Can one amputate the hand of a person hungry for bread in an inequitable society? Can one punish by stoning a person who has committed adultery in a society where young people cannot easily get married and find accommodation? "Start by guaranteeing people a minimum of equity and a dignified human life, then implement against them the penalty for stealing."³

¹ Zakariyya: *Al-haqiqah wal-wahm*, p. 75-91.

² *Ibid.*, p. 167-170.

³ *Ibid.*, p. 150-154.

3) Mahmud Muhammad Taha

Mahmud Muhammad Taha, a retired architect, founder and leader of the circle of the "Republican Brothers," in Sudan, wrote two important works *Al-risalah al-thaniyah min al-islam* (The Second message of Islam)¹ and *Tatwir shari'at al-ahwal al-shakhsiyyah* (The Evolution of the law of personal status).² He was hanged the 18 January 1985 for apostasy under the order of Numeiri, at the instigation and the applauses of the Sudanese religious leaders, the Azhar and the Muslim World League.³

In his work *The Second message of Islam*, Taha considers Muhammad as a bearer of two messages:

- The first message constitutes the totality of juridical norms revealed to Muhammad, during the period of Medina alone. They address themselves to the believers and they take into account the conditions of the time.
- As for the second message, it corresponds to Islam in its full force and purity and addresses itself to the whole of human kind. The second message has not yet been implemented.⁴

Whereas, according to the Islamic doctrine, it is the verses that were revealed later which abrogated the previous norms, Taha affirms that it should be the contrary.⁵ In order to understand the reasoning of Taha, it is interesting to see the position of Jesus with regard to repudiation. When he affirmed that repudiation was contrary to the biblical prescriptions, the Jews asked him: "Why then did Moses command us to give a certificate of dismissal and to divorce her?" He said to them, "It was because you were so hard-hearted that Moses allowed you to divorce your wives, but at the beginning it was not so" (Mt 19:7-8). The Bible would therefore contain norms of origin and others circumstantial. Without referring to the Gospel, Taha affirms somewhat the same thing.

The concept puts into question the whole of the economic, political and juridical system in the Arab and Muslim countries.

On the economic level, Taha proposes to replace the verse on the *zakat* (alms-giving):

Take alms of their wealth wherewith you cleanse them and purify them (113/9:103).

with the following verse:

They ask you: "What they must spend?" Say: "The excess" (87/2:219).⁶

¹ Taha: *Al-risalah*. This work has been translated: Taha: *The second message of islam*. The translator is a disciple of Taha.

² Taha: *Tatwir*.

³ For more information, see text and commentary in Al-Kabbashi: *Tatbiq al-shari'ah al-islamiyyah*, p. 80-96 (the author presided over the court of appeal which condemned Taha. For a criticism against the doctrine of Taha, see Zaki: *Al-qawl al-fasl*. For one in favour of Taha, see An-Na'im: *Toward an Islamic reformation*.

⁴ Taha: *Al-risalah*, p. 116.

⁵ *Ibid.*, p. 6.

⁶ *Ibid.*, p. 161-162.

In matters of politics, Taha proposes to take into consideration the verse which makes of Muhammad an ordinary herald:

Therefore do remind, for you are only a reminder. You are not a dominator over them (68/88:21).

and to leave out the verse of consultation:

It is by mercy from God that you were lenient to them! Had you been rough, hard-hearted, they would have dispersed from around you. So forgive them, and ask forgiveness for them. Consult them about the affair. Once you are resolved, confide in God. God loves those who confide (89/3:159).¹

In matters of religion, *the verse of the sword*:

Once the forbidden months are over, kill the associators wherever you find them. Take them, besiege them and lie in wait for them in every ambush. If they repent, perform the prayer and give the purificating [alms], then let them go their way. God is forgiver, very-merciful (113/9:5).

must be replaced with the verse on religious freedom:

There is no compulsion in religion! The righteousness has been made clear from the error. Whoever disbelieves in the idols and believes in God, has grasped the most trustworthy hand-hold that never breaks (87/2:256).²

In the domain of personal status, Taha explains that Islam installed itself during the period when women were oppressed, or even buried alive. Unable to give them their full rights, it tried to improve their fate by giving them half of what a man gets in matters of inheritance, and by considering the testimony of two women as being the equivalent of the testimony of one man. Moreover, it placed them under the guardianship of a man:

Men stay above the women because God favoured some of them over others, and because they spend out of their wealth (92/4:34).

This inequality, however, was not meant to be definitive. The basic norm which it is necessary to come back to is the absolute equality between men and women based on personal responsibility:

A bearer of burdens cannot bear another's burdens. If one heavily laden should call [another to bear] his load, no other can carry any part of it, even if they were related (43/35:18).³

It is necessary, in view of this, to put an end to the guardianship of men over women in matters of marriage consent. Taha recalls here that the Hanafites had accepted that the woman could get married without the permission of the guardian.⁴

Economic independence plays an important role in equality, for, according to the Koran, the superiority of man on the woman is due to the expenses he incurs for her upkeep.¹ The Koran says:

¹ *Ibid.*, p. 162.

² *Ibid.*, p. 3 and 118.

³ *Ibid.*, p. 126-127.

⁴ Taha: *Tatwir*, p. 73.

And the [women] have rights similar to those [of men] over them, but men have a degree above them (87/2:228).

The superiority is temporary, depending on usages. If the usages change and the obligations of the women become equivalent to those of men, then it is necessary to accord them rights equal to those of men. It is inadmissible that women hold the post of judges when their testimony continues to be considered half of that of the testimony of lay men.² This does not necessarily mean that a woman should do any job that a man can do. She should be given a job that corresponds to her abilities (judge of the adolescents, doctor, etc.). It is also necessary to value the domestic work of the woman. The woman who gives birth to children deserves more honour than the technicians who make planes.³

In what concerns dowry, Taha considers it to be the price paid by a man for the purchase of the woman. It was one of the three modes of marriage at that time where the woman was a mere object of humiliation: capture in a *razzia*, abduction and purchase. Today, in a period where women must be honoured, such practices should be stopped. On this level, he points out that Muhammad allowed marriage without a dowry.⁴

The circumstantial aspect is found in the verse which permits polygamy:

Marry the women who please you: two, three and four. But if you fear not being just, then only one (92/4:3).

The rule of polygamy with four wives was an attenuation of a pre-Islamic practice according to which man could marry as many wives as he wished. It may have been meaningful during times when wars exterminated men leaving a great number of women without marriage. The above mentioned verse, according to Taha, has been abrogated by the verse of equity:

You can never be equitable between your wives, even if you make every effort (92/4:129).⁵

As for repudiation, Islam has given this right to man since he is the guardian of the woman, the latter being considered incapable. But, in principle, the right should be given as much to the man as to the woman. Men of religion who claim the contrary forget that Muslim norms have a temporary character and that religion did not say its last word during the 7th century.⁶

Taha also denounces the veil. Islam does not want a chastity that is imposed by closed doors and clothes. The veil is but the result of the sin of Adam and Eve who covered their nudity with leaves of trees. In verse 39/7:26, the Koran speaks of the robe of reverential fear as a better vestment than the robe of cloth. The veil was a

¹ *Ibid.*, p. 78-79.

² *Ibid.*, p. 4, 11 and 48.

³ *Ibid.*, p. 55-56.

⁴ Taha: *Al-risalah*, p. 128; Taha: *Tatwir*, p. 73-75.

⁵ *Ibid.*, p. 127-129; Taha: *Tatwir*, p. 76-78.

⁶ *Ibid.*, p. 75-76.

punishment from God due to bad conduct. Islam is against the veil and the prohibition of interaction between men and women because Islam stands for liberty.¹

4) Muhammad Ahmad Khalaf-Allah

The Egyptian thinker Muhammad Ahmad Khalaf-Allah (d. 1997) wrote three primary works: *Al-Qur'an wal-dawlah* (The Koran and the State); *Dirasat fil-nudhum wal-tashri'at al-islamiyyah* (Studies of the Islamic institutions and legislations); *Al-Qur'an wa-mushkilat hayatina al-mu'asirah* (The Koran and problems of our current life).

In these books, he proposes some juridical and social reforms for which the starting point is the Koran for three reasons:

- It is the Koran which called for a great revolutionary change at the time of Muhammad.
- Only the Koran can pretend to contain norms valid for all times and for all places, for God, its author, could foresee and appreciate their needs.
- The Koran constitutes the first source of law; the *Sunnah* limits itself to clarifying it.²

About this last point he writes:

All the Muslims agree about the supremacy of the Koran, which is considered by the jurists as the first source of legislation, adding that the *Sunnah* is none other than a clarification and an interpretation; when it enters into contradiction with the Koran, it must be discarded and become almost non-existent.

The unanimity over the discourse of the Koran and its place among the sources of legislation leads us directly to the Koran to make of it the first and principle source for what we seek as an eternal human value capable of being the foundation of a modern society and a lively reserve from which we can deduce solutions closer to problems of our contemporary life. Only the Koran is the original source, any other source is only useful for clarifying and interpreting. The Koran is therefore enough for us as guide and help.³

The theory of Khalaf-Allah leads him to neglect almost totally the *Sunnah* in his analyses. Freed from this source, he endeavours to interpret the Koran in an original reductive manner. For him, the Koran only traced the principle passages which protect people from error and direct their steps on the path of truth, justice and public interest. Details and all that which is influenced by "time" and "space" elements are left to man.⁴ This thought was summarized to me during an encounter with him in Cairo the 25 August 1977:

It is necessary to try and limit to the maximum the door of the normative elements of Islam. It is necessary to be sure that a given question has truly been regulated by the Koran; and in that case, that the Koranic text cannot be traced back to its original historical context. I am not condemning the Koran through

¹ Taha: *Al-risalah*, p. 131-133.

² Khalaf-Allah: *Al-Qur'an wa-mushkilat*, p. 11-15.

³ *Ibid.*, p. 15.

⁴ Khalaf-Allah: *Al-Qur'an wal-dawlah*, p. 3-4.

our more developed norms, and I am not placing the Koran outside its historical context either.

Khalaf-Allah goes even further. For him, the Koran, by declaring that Muhammad is the last of the prophets (Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets. God is knower of everything, 90/33:40), gives to human reason its liberty and its independence so that it decides matters of this life in conformity with the general interest.¹ He relies in this largely on the famous theory of Al-Tufi (d. 1316)² which places the general interest itself above the text of the Koran.³ He reckons that God gave us the right to legislate in the political, administrative, economic and social domains. The norms that we establish become conform to Islamic law because they emanate from us with God's accord by proxy. And these norms can be modified in relation to time and space so that they attain the general interest and a better life.⁴

Suffice in this regard to cite one example to illustrate the method of Khalaf-Allah: that of mixed marriages which pose problems. In fact, the law of Muslim countries forbids marriage between a Muslim woman and a non-Muslim, but it allows a Muslim to marry a non-Muslim woman, on condition that she be a monotheist. Khalaf-Allah considers that this discriminatory law must be suppressed.

Khalaf-Allah affirms that the Koran has not regulated marriage between a Muslim woman and a non-Muslim monotheist. In case of the silence of the text, the decision lies with the man, in accordance with the Muslim principle: whatever is not forbidden is allowed. One cannot stretch the list of the prohibited. For want of formal prohibition, the general interest of society requires the reinforcement of social relations through marriage. The only prohibition mentioned in the Koran is the marriage between Muslims and polytheists in accordance with the following verse:

Do not marry the associating women until they believe. A believing maid is better than an associating woman, even though she astonishes you. Do not give in marriage to the associators until they believe. A believing slave is better than an associator even though he astonishes you. Those invite to the fire, while God invites, with his permission, to the garden and to forgiveness (87/2:221).

Yet, the term polytheist aims at pagans of Arabia who have ceased to exist. Through this reasoning, Khalaf-Allah writes that the adepts of religious groups must cease adopting fanatical positions, elevate themselves to the level of man as a human being and allow mixed marriages, so as to avoid tensions which exist among them and reinforce social relations. They must replace religious relations by national ones, and place themselves on the level of belonging to a common humanity.⁵

¹ Khalaf-Allah: *Al-Qur'an wa-mishkilat*, p. 32.

² For more information about Al-Tufi see Part III. chapter I.9.

³ Khalaf-Allah: *Al-Qur'an wa-mishkilat*, p. 33-38; Khalaf-Allah: *Al-Qur'an wal-dawlah*, p. 109-111.

⁴ Khalaf-Allah: *Al-Qur'an wal-dawlah*, p. 189-192.

⁵ Khalaf-Allah: *Al-Qur'an wa-mushkilat*, p. 192-214.

5) Abdelmajid Charfi

Abdelmajid Charfi is a professor in the Faculty of Arts and Humanities of Manouba in Tunis, and titular of the UNESCO Chair of comparative studies of religions. He invested a lot of effort in the interpretation of Muslim norms. He wrote several works of which we cite particularly *Al-Islam wal-hadathah* (Islam and modernity), published in 1991, and *Al-Islam bayn al-risalah wal-tarikh*, (Islam between the message and history) published in 2001 which was translated into French as *L'islam entre le message et l'histoire*, and which we will use here, this being his last work. We shall limit ourselves to his thought in line with the subject of our work.

Charfi does not see any interest in splitting the Koran into two and in suppressing the normative part as does Taha whose opinion has been exposed above.¹ He considers that the revelation given to Muhammad "does not speak about the *Shari'ah* in the sense of divine law, but it gives it the meaning of path." He cites in this regard verse 65/45:18: "Then we put you on a path of the order. Therefore follow it and do not follow the desires of those who do not know." Except for rare cases, revelation "does not give details of the modalities of the juridical implementation of this direction, and limits itself to giving some occasional solutions to problems faced by the Muslim community of the time."² The message of Muhammad is not juridical, but it "deals with what had been good and what was bad at the time when the revelation occurred." This explains the flexibility of the Koranic norms even in cultic domains such as prayer, pilgrimage, alms-giving or the fasting of Ramadan. It was only later that Muslim jurists established rigid norms which betray the spirit of the Koran, by inventing the hadiths in support of their positions, transforming the acts into mechanical, formal rituals, unadapted to the demands of current life.³

This reasoning is extended by Charfi to purely juridical norms like apostasy, for which the Koran does not foresee chastisement here on earth, but which jurists punish with death by inventing a hadith attributed to Muhammad, violating the Koranic prescription which forbids every religious constraint (There is no compulsion in religion! 87/2:256). The same goes for the death penalty which the Koran advocates (It is prescribed for you retaliation in the killed, 87/2:178), but by insisting more on forgiveness by the next of kin of the victim than through the sanction. He adds: "Punishment, under whatever form, is not advocated for its own sake, but in relation with the demands of life in the widest sense possible [...]. In this case, the switching from capital punishment to imprisonment or something else is not incompatible with the general principle enounced by the Koran" and it is in view of preventing the innocent from being condemned to death through judicial mistake as well as to leave the door open to a possible redressing of the fault. Charfi also extends this reasoning to the amputation of the hand of the thief (As to the thief, man or woman, cut off their hands 112/5:38), which can be replaced with other sanctions provided one can obtain the same results sought by the Koran

¹ Charfi: *L'islam entre le message and l'histoire*, p. 68.

² *Ibid.*, p. 67-68.

³ *Ibid.*, p. 68-73, 133-135.

through other means.¹ The rigidity of the jurists is manifested in what concerns adultery which is punished in the Koran by lashing (The fornicatress and the fornicator, you shall lash each of them one hundred lashes, 102/24:2), and by the jurists by stoning.² Charfi also gives the example of the waiting period of the repudiated woman or the widow (87/2:228; 99/65:4). The reason for this Koranic norm is to ensure that the woman is not pregnant. Arab legislations continue to recommend the waiting period although the Koranic objective can be secured through scientific means, tested and simple at the same time.³

In what concerns the Koranic prohibition of interest, it targets usury which preoccupied the debtor, and not the current relations between the bank and individuals, relations which are regulated by the State in order to avoid usury. It is therefore necessary to see the objective of the Koranic verses and not their literal implementation. This avoids juridical expedients and acrobatics practiced by the Islamic banks themselves, with the blessing of official religious authorities. These banks, he says, "are only nominally Islamic and the benefits they draw from loans, to which they give another name in order to dissimulate them, are undoubtedly superior to normal banks. They profit in reality more their managers than their abused clients." He salutes in this regard the courageous position taken by the Shaykh of Al-Azhar in 1998, when he criticized the banks called Islamic, by signalling his preference for ordinary banks."⁴

Basing himself on these examples, Charfi considers that one is not obliged to understand the message of Muhammad as did his contemporaries:

Muslims, by blindly following their scholars and the leaders of juridical schools and sects, fall under the same category as the "People of the Book" before them, who have acknowledged Lords besides God, which the Koran denounces (They took their doctors, their monks, and the Messiah son of Mary, as lords besides God, whereas they are commanded to adore only one God, 113/9:31). Forgetting the flexibility which characterizes as much the message as the conduct of the Prophet, Muslims take the one and the other as a pretext for immobilism and not as material for reflection.⁵

Charfi relies in his reasoning solely on the Koranic text. He does not take into account the hadiths, to which he does not give credit.⁶ Furthermore, he reckons that classic jurists have veiled their juridical solutions with religion, by pretending that they have not actually realized a human work, since God alone is the legislator, in spite of their disagreement over many questions.⁷ The activities of the jurists have led to a serious consequence: "Muslims have foregone consulting directly the Koranic text in favour of secondary texts from which they pretend to draw lessons, whereas they constitute an obstacle to comprehension and to a person's reflection

¹ *Ibid.*, p. 75-79.

² *Ibid.*, p. 92-93.

³ *Ibid.*, p. 94-95.

⁴ *Ibid.*, p. 80-81.

⁵ *Ibid.*, p. 89-90.

⁶ *Ibid.*, p. 148-152, 174-178, 192-199.

⁷ *Ibid.*, p. 158-1162.

and self-conduct without the guidance of anybody and in all freedom."¹ Charfi also rejects the recourse to consensus as a source of law; he sees in it two major defaults. Above all, the fact of it being confined to the opinion of the experts in the interpretation to the exclusion of others, namely the ordinary people, which is contrary to the spirit of the Koran. On the other hand, only the consensus of a particular epoch – i.e. the consensus of the *faqih*s of the 9th and 10th centuries – was considered as binding for later generations. However, he says, we should rather take into account what the community of a given period thinks, whether that conforms to the opinion of the ancients or not, especially if the circumstances and the situation are radically different.² Charfi also rejects *qiyas* (analogical reasoning) which always draws attention to the past, not to the present, and less so to the future. It serves to assure the apparent continuity between the time of the Prophet and the successive periods.³ Thus, Charfi makes *tabula rasa* of the science of the principles of Islamic law which have not known any notable development since the first great works and which only repeat the discourse of the ancients, in spite of all the changes which have affected the historical context and human knowledge.⁴

Charfi goes even further in adopting a concept near to that of Khalaf-Allah concerning the Koranic affirmation that Muhammad is the last of the prophets (Muhammad was not the father of any one of your men, but the messenger of God and the seal of the prophets. 90/33:40). The verse is traditionally interpreted as signifying that Muhammad seals the chain of prophets and that his message confirms theirs and is even superior to them. The door has been secured from inside and Muslim norms are binding for all the Muslims. For Charfi, on the contrary, Muhammad secures the door from outside, he closes the door of prophesy and puts an end to it, this not being necessary any more:

[Muhammad] announces for the whole of humanity the inauguration of a new era, of a new stage in history where man, having attained maturity, will no longer have need for a guide or a guardian for the least details of his existence. In this perspective, the role of the Prophet of Islam would be to guide man in his new responsibility and to make him accept the consequences of his choices... In all freedom, man shall live in houses he will have constructed through his own personal efforts, by what his reason indicates for him, by what his intelligence procures him, by the demands of his personal and communal interests... The Prophet is truly "a witness, an announcer and a warner;" through his words and acts, he is "a good example." He has given the example by practicing justice, love, mercy and piety, as well as by leading an upright life well adapted to the situations he lived, and not because he had regulated, in a complete and definitive manner, what should be done and what should be avoided, in every situation and in whatever circumstances. Were it so, he would have reinforced the

¹ *Ibid.*, p. 168.

² *Ibid.*, p. 179-182.

³ *Ibid.*, p. 182-184.

⁴ *Ibid.*, p. 184-185.

conformism he had come to fight; he would have only replaced one tradition with another.¹

6) Mohamed Charfi

Mohamed Charfi, Emeritus Professor of the Faculty of Law of Tunis, had been president of the Tunisian League of Defence for Human Rights and minister of national education from 1989 to 1994. Although he has been author of many juridical texts, we shall limit ourselves to his last work: *Islam et liberté, le malentendu historique* (Islam and freedom, the historical misunderstanding), published also in Arabic under the title: *Al-Islam wal-hurriyyah, al-iltibas al-tarikhi* (Islam and freedom, a historical misunderstanding).

Charfi opposes the affirmations of the Islamists. Whereas for the latter Islam is as much religion as a State, for Charfi, Islam "is neither... law, nor State, nor politics nor identity. It is a religion. Above all, having for essence a universal vocation, it can be linked neither to a people, nor to a territory, nor to a State, and less so, to a particular political system."²

On the other hand, for the Islamists, Islamic law is a divine law, just and immutable, whereas for Charfi it is a question of a human effort, a product of history which is contrary to the Koran as well as to human rights. He gives in this regard the example of slavery, a well elaborated institution in Islamic law. If one was to admit that Islamic law is a divine law, it should also be necessary to go back to slavery. Yet, Islamists do not claim a return to such a practice. What they claim are especially norms related to personal status which discriminate against women, to penal law and to freedom of conscience.³ These norms are contrary to the spirit of the Koran.

Charfi condemns Muslim norms that are discriminatory against women: law exclusively reserves the right to man to marry several women, to repudiate and beat his wife and the attribution of the guardianship of the children to the father; the attribution to the woman of a succession share of half less than that of men of the same level of relation; the prohibition for women to exercise a leading function; the obligation of the wearing of the veil, etc. The Koran has taken up norms that existed in its time, whilst trying to make them better, but the *ulamas* "went as far as possible in the regulation of the details of their implementation, each time making worse the discriminatory character."⁴

The infringement on freedom of conscience violates, in an even more flagrant manner, the Koran which affirms: "There is no compulsion in religion!" (87/2:256). "With such clear divine words, one would expect the *ulamas* to come up with a sound theory of the freedom of conscience. Such has not been the case. On the contrary, they have handed down to us a series of rules that are detrimental to the freedom of conscience."⁵ There is above all the discrimination against non-Muslim

¹ *Ibid.*, p. 100-101.

² Charfi: *Islam et liberté*, p. 58.

³ *Ibid.*, p. 64-67.

⁴ *Ibid.*, p. 67-73. Concerning polygamy, see also p. 103-104.

⁵ *Ibid.*, p. 73-74.

minorities. Certainly, Muslim norms concerning these minorities were more advanced than the norms of other juridical systems, but today this system is no longer acceptable. Charfi demands in this regard the suppression of every reference to religion in the citizens' identity documents in order to establish at least apparent juridical equality, the theoretical non-discrimination among the believers. He further demands that neither the constitution nor the law should establish any distinction among the citizens who must all be equal in duties and rights.¹ But more serious even than the discriminatory fate reserved to the religious minorities, there is the one reserved to Muslims who abandon the Muslim faith, the apostates, against whom the *ulamas* have decreed the death penalty, although the Koran does not recommend any chastisement concerning them here on earth. The sanction against apostasy served not only to undermine freedom of conscience, but also political opposition, every freedom of expression and every innovation.²

Finally, in what concerns the Islamic penal law, Charfi notes that it is because of this law that Islam has currently such a bad press abroad. Yet, "for these severe dispositions, the law has nothing religious about it. It has been the work of the *ulamas*. As for the other dispositions, they can be explained by historical circumstances and are therefore supposed to be surpassed today."³ Thus, the *ulamas* have pretended that a verse advocated stoning for the offence of adultery, but it has disappeared from the Koran whilst remaining in force! On the other hand, they pretended that Muhammad had implemented such a sanction. But the two arguments go against the Koran since the latter only recommends lashing.⁴ Concerning the amputation of the hand of the thief, the Koran prescribed it due to the fact that during the time of Muhammad there were no prisons and the sanction served to dissuade conflicts between the tribes. But the Koran suggests the possibility of repentance and of forgiveness for this offence.⁵ Charfi considers that modern Arab legislators, "by replacing corporal chastisement with the penalty of the prison, do not contravene the Koran. On the contrary, they adopt solutions that are more in conformity with its spirit."⁶

After these developments, Charfi arrives at two conclusions:

On one hand, a good number of the rules of classic Islamic law or *Shari'ah* are contrary to human rights as understood today by the international community... on the other hand, these rules... do not truly have a religious nature. They were put down by men and they should be reformed today by men.⁷

According to Charfi, the determination of the fundamentalists and the traditionalists in wanting to perpetuate these injustices can be explained by three reasons:

¹ *Ibid.*, p. 75-77.

² *Ibid.*, p. 78-89.

³ *Ibid.*, p. 78-89.

⁴ *Ibid.*, p. 91-93.

⁵ *Ibid.*, p. 95-99.

⁶ *Ibid.*, p. 95.

⁷ *Ibid.*, p. 104.

- An Islamist cannot conceive that a non-Muslim can be a full fellow citizen. He sees in him, if not an adversary, at least a stranger. In his spirit, never should a Muslim be subordinated to a non-Muslim.¹
- The anti-feminist attitude of the fundamentalists, due to the fact that they live in another era. They have not yet digested the principle of equality of sexes, a principle that is completely new in the history of humanity.²
- The existence of rural reflexes. Even among those who have emigrated towards urban areas, these reflexes persist. Rural dwellers have always had the most rude and brutal temperament and the most severe sanctions, whence their attachment to Islamic corporal chastisements.³

Throughout his book, Charfi takes into account the Koran alone. For him, the hadiths are a controversial source of Islamic law.⁴ Yet, "Jurists need clear and precise texts in order to construct their theories and deduce from them practical applicable rules. The Koran is the only source which escapes from any criticism in relation to certitude."⁵ He rejects the idea that a hadith can abrogate the Koran.⁶ But even for the Koranic norms of juridical character, like those concerning penal law, he considers that they constitute a stage in the evolution of society and that this stage no longer exists today.⁷ The same goes for successional norms. The conferring by the Koran of half of the share given to the man constituted progress at the time of the Koran, and this inequality can be corrected by means of a will through which the testators would establish equality among their descendants without any sexual distinction, while waiting for the day when successional equality will be imposed by the law, in conformity with the spirit of the Koran.⁸

According to Charfi, God addresses himself to men by speaking to them in a language that they understand and he expresses general recommendations. It is then up to the legislator of each country "to find for every period the law which best accomplishes the recommendation. In the world we live in today, it is the work of the State which must be in itself the expression of the universal suffrage. The legislator should not in any way be bound by the *Shari'ah*, a purely human and a largely obsolete work."⁹ Thus, Charfi descends from the notion of "God legislator," to the notion of "State legislator," and in Islamic law, "divine law," becomes "human law," adaptable according to changing times.

He points out that in this regard the *ulamas* of the past tried to adapt the *Shari'ah* to their time. As they never dared to declare that religious law is abrogated, a move that would have undermined their authority, they had recourse to the ruses (*hilah*) in order to circumvent norms which they judged outdated. Thus, they asked for

¹ *Ibid.*, p. 104-105.

² *Ibid.*, p. 106-108.

³ *Ibid.*, p. 108-110.

⁴ *Ibid.*, p. 110.

⁵ *Ibid.*, p. 112.

⁶ *Ibid.*, p. 166.

⁷ *Ibid.*, p. 113.

⁸ *Ibid.*, p. 113-116.

⁹ *Ibid.*, p. 120.

impossible proofs to be brought forward in the implementation of stoning: four eye-witnesses who saw the feather in the inkwell, according to their virtuous and imagery expression. Similarly, when a woman gives birth two, three or even four years after the divorce or the death of her husband, they would say that the baby fell asleep in the womb of the mother (the theory of embryo dormancy), with the objective of safeguarding the rights of the woman and the child. Similarly, in order to be able to amputate the hand of a thief, several conditions must be fulfilled.¹ The same goes for interest, forbidden in Islamic law, just as for the Jews and the Christians, but which was circumvented by contracts with an Islamic colouration which are "truly false pretences."² A theologian pretending that God forbade loans with interests cannot one day revise his view in order to say the contrary. He cannot say that his predecessors were mistaken or that the change of circumstances should entail the change of the rule. That would signify that the *Shari'ah* can change, that it is not fixed and therefore it is not the handiwork of God. All he can do is to devise a ruse to circumvent the norm.³ However, the method creates problems for the Muslims:

We drag on rules which we know... that they are inadaptably and religiously unbinding, but which we do not dare to say that they have been abrogated or can be abrogated. As long as a rule has not been abrogated, we continue to teach it in schools, in universities or preach it on Fridays. It continues to nourish the religious discourse. It is a conflict between the apparent and the real, the declared and the thought, which nourishes the schizophrenic thought particular to the Muslim world and encumbers it. Hence, there will always be, among the hearers of this discourse, simple spirits which will take them literally and would want to see them implemented whence the troubles and the popular demands for a return to an archaic law.⁴

Another procedure for circumventing religious norms consists in some improvisation (*tafiiq*). It is a question of finding a justification in the religious text through a guided research – an artificial method, a bit suspect and not always credible. It is thus that Tunisia forbade polygamy basing itself on verse 92/4:3: "marry the women who please you: two, three and four. But if you fear not being just, then only one," and on verse 92/4:129: "You can never be equitable between your wives, even if you make every effort. But turn not altogether away [from one], leaving her as suspended." This verse indicates, according to the Tunisian legislator, that the Koran forbids polygamy, since the condition of equity is impossible to fulfil.⁵ Charfi comments:

A law that is contrary to the religious convictions of a society should not be imposed on it, but the law can be reformed if there is in religion sufficient support for it to be understood in a different manner.⁶

¹ *Ibid.*, p. 123-126.

² *Ibid.*, p. 127.

³ *Ibid.*, p. 132-133.

⁴ *Ibid.*, p. 131.

⁵ *Ibid.*, p. 138-140.

⁶ *Ibid.*, p. 140.

This manner of interpreting the Koran by playing on words requires an interaction between the intellectuals and enlightened politicians. And as this interpretation is not the only one possible and circumstances are not that favourable, Tunisia was the only country to forbid polygamy.¹

Another method consists in having recourse to hermeneutics which seek the spirit of the Koran by placing "every question within the universal divine design," by integrating the time factor: "A rule may have been useful at a particular moment; with time and with changing circumstances, if it is no longer adapted, it should be made possible to change it." This is what the Koran does in admitting the abrogation of some verses by others. If, therefore, the Koran within a period of twenty-two years felt the need to modify the norms, *a fortiori*, that should be replicated over a much longer period of time; the fourteen centuries which separate us from the death of the Prophet. This does not mean that the whole *Shari'ah* should be abrogated: "One should be guided according to the objectives of religion such as can be discerned from the Koran and from the conduct of the Prophet. Simply put, an evolution that has started, should be continued."² One of the most obvious examples is the one of slavery, which the Koran did not abolish, but it attenuated it by encouraging the proprietors to free the slaves. It was a step towards the abolition of slavery.³

Charfi then deals with the method of Mahmud Muhammad Taha, of whom we spoke above. He agrees with him about the fact that the fundamental verses on equality or religious freedom revealed in Makka and which constitute the basic principles which have become universal values nowadays may have abrogated the circumstantial Medina verses.⁴ But he reckons that "the considerations of Taha are somewhat excessive. It is not easy to affirm, not even to intimate that all the Medina verses, around a third of the Koran, were abrogated, just as it is not easy to admit that there exists today a second message which would be a kind of a new religion." On the other hand, the theory has the inconvenience of replacing a religious law with another religious law.⁵

The method which finds favour with Charfi is that of how to "liberate law,"⁶ that is, to separate religion from law. "Religion is a question of conviction, a matter for the heart. The conscience of every human being must be absolutely free. To believe or not to believe... Every constraint here is against nature." This is expressed by the Koran which says: "There is no compulsion in religion! (87/2:256); "Say: "O humans! The truth came to you from your Lord. Whoever is guided is guided only for himself. Whoever is misguided is misguided only against himself. I am not your guardian" (51/10:108). The Koran cannot therefore be confounded with a code which by definition imposes and only imposes. "Certainly, the Koran contains some recommendations, but the ones which were linked to circumstances and

¹ *Ibid.*, p. 141-142.

² *Ibid.*, p. 140.

³ *Ibid.*, p. 145-146.

⁴ *Ibid.*, p. 148-150.

⁵ *Ibid.*, p. 150-151.

⁶ *Ibid.*, p. 150.

which were understood by the first Caliphs as precisely being linked to circumstances and having to change with the circumstances.¹ Charfi gives several examples where the Caliph 'Umar (d. 644) suspended the implementation of some Koranic norms, which proves that for him, "the verses known as juridical are no other than recommendations linked with circumstances and having to change with them."²

And Charfi concludes:

It is time to put an end to this sterile debate about the meaning of such and such a verse supposed to be juridical and to clearly and definitively separate law from religion.³

He also demands to separate religion from politics so as to avoid the pollution of political life and to facilitate the installation of democracy in Muslim countries.⁴ He rejects in this regard the idea that Muhammad had established a State, and reckons that the Caliph is only a human invention not mentioned in the Koran which happened after the death of Muhammad – a theory developed by the Egyptian 'Ali 'Abd-al-Raziq (d. 1966) following the abolition of the Caliphate by Ataturk in 1924. Did the Koran not say to Muhammad: "Therefore do remind, for you are only a reminder. You are not a dominator over them (68/88:21-22)"⁵ This signifies "one has no right to govern in the name of Islam."⁶ Charfi also rejects the idea of *jihad*, in the sense of holy war which aims at propagating faith or conquering other countries. For him, war can only be qualified as being holy if it is defensive.⁷

Charfi goes even further. For him, "it is time... to liberate the State from Islam and Islam from the State;"⁸ a bit like the occidental way of separating the State and the Church. But as the Church does not exist in Islam, he proposes the creation of a fourth power which would take care of religious matters and the management of mosques. The latter "should be places of worship and meditation where no wrangles or ideological unrest would disturb the peace. Their political neutrality should be clearly affirmed and scrupulously respected... The distinction between law and religion having been clearly established and since acknowledged by all, *muftis* and *imams* would have to align their gestures and words with law, never against it."⁹ The fourth power must be democratically organized: election of the *imams* in each mosque by the believers who regularly pray in it, election by the *imams* of the *mufti* in every region and the choosing by the same electoral board of a Supreme Muslim Council and a Grand *Mufti* on the national level.¹⁰ Furthermore, a constitutional

¹ *Ibid.*, p. 153.

² *Ibid.*, p. 154.

³ *Ibid.*, p. 154.

⁴ *Ibid.*, p. 155-156.

⁵ *Ibid.*, p. 157-165. Charfi cites various verses with the same meaning (footnotes 14-22, p. 262-263).

⁶ *Ibid.*, p. 168.

⁷ *Ibid.*, p. 167.

⁸ *Ibid.*, p. 192.

⁹ *Ibid.*, p. 195-196.

¹⁰ *Ibid.*, p. 196.

organ of the highest level would oversee the political neutrality of the religious power and would be empowered to dissolve it should it divert from this principle.¹

Such a project, however, could not be achieved without having to revise the academic and cultural system. It is not enough that secularism be imposed, as in Turkey. In this country, as in all the other Muslim countries, they continue to teach "that it is necessary to amputate the hand of the thief, stone the author of adultery, kill the apostate, close the banks and wage war against disbelievers, and they present the Caliphate as a legitimate regime *par excellence*, whereas in political, social, economic and juridical life, they do exactly the opposite. Because of this, believers are torn between two contradictory modes of thinking, what they learn and what they practice. If the factor of dissatisfaction is added to it, one part of the opinion is tempted to drift towards the fundamentalists.² This explains the instability of the Turkish regime and the occasional interventions of the army in order to keep away the threats of the fundamentalists.³ Charfi dedicates in this regard the last chapter of his book to education in schools and through media programs, a very important chapter due to the role played by the author as minister of education in the reform of the Tunisian educational system. This, however, goes beyond the scope of our work.⁴

7) Zaki Najib Mahmud

Zaki Najib Mahmud (d. 1993), Professor of philosophy at the University of Cairo, is the most important contemporary philosopher of the Arab world. He considers himself an adept of scientific positivism.

He has written three books to respond to the question: "What straight path should the contemporary Arab thought take which would guarantee its remaining truly Arab and truly contemporary."⁵ For him, should be borrowed from the Arab past only what is useful for our society. Utility is the criteria as much in what concerns the Arab civilization as in what concerns modern civilization.⁶ In order to decide what is useful and what is not, it is necessary to have recourse to reason, whatever the source; revelation or not.⁷ This presupposes the rejection of every sanctity associated with the past.⁸ Things should be appreciated in practice, without falsifying the historical data or falling into generalizations.⁹

For him, it is necessary to view principles as hypotheses and not as truths. These principles should be able to be changed according to needs without fear, even if this would shake up everything.¹⁰ "The key of the truthful, today, is to properly

¹ *Ibid.*, p. 198.

² *Ibid.*, p. 200.

³ *Ibid.*, p. 201.

⁴ *Ibid.*, p. 203-247.

⁵ Mahmud: *Tajdid al-fikr al-'arabi*, p. 10. The two other books are: *Thaqafatuna fi muwajahat al-'asr*, and *Al-ma'qul wal-la ma'qul*.

⁶ Mahmud: *Tajdid al-fikr al-'arabi*, p. 18-20; Mahmud: *Al-ma'qul wal-la ma'qul*, p. 34.

⁷ Mahmud: *Tajdid al-fikr al-'arabi*, p. 21; Mahmud: *Thaqafatuna*, p. 96.

⁸ *Ibid.*, p. 51-53.

⁹ *Ibid.*, p. 65, 79, 80.

¹⁰ *Ibid.*, p. 197, 204, 227.

assimilate the idea that we are in transformation; therefore we are in mutation; therefore the past cannot govern the future."¹

Before building up a modern society in Arab countries, it is necessary to uproot two elements:

- The idea espoused by the Arabs concerning the relationship between heaven and earth, according to which "heaven commands and the earth obeys; that the Creator has traced and designed the world order and the creature has only to content himself with his destiny and his fate."
- The idea espoused by the Arabs concerning divine will; that it breaks every link between the cause and the effect. According to this idea, a superior authority flouts natural laws.²

In his book *Al-Ma'qul wal-la ma'qul* (The rational and the irrational), he proposes to retain from the past only the rational aspect and to reject the irrational. The irrational comprises the myths, mysticism, reverence of pious people, sorcery, astrology, etc., given that these matters are not subjected to reason. I asked him when I met him during a meeting the 26 May 1977, where did he place revelation: is it rational or irrational? Hence, should it be retained or discarded? In response, he dictated me what follows:

Revelation is a point of departure, a hypothesis, from which flows reasoning. If someone wants to analyse a question contained in revelation, his analysis must be done in a rational manner. On the contrary, revelation in itself is a matter of faith, that is to say a premise the exactitude of which is reliable so as to base on it the operations of deduction.

In order to understand this ambiguous response, it is necessary to go back to a page in his book *Tajdid al-fikr al-'arabi* (The renewal of the Arab thought) where he says that an ideological system cannot be preferred to another one on the basis of exactitude or inexactitude, but on the basis of utility.³ In so doing, he avoids entering into the question of examining the Muslim system which risks posing him political problems. But it seems clear for us that he rejects revelation. The philosophical system which he acclaims rejects metaphysics and considers it a myth.

Zaki Najib Mahmud belongs to the generation which, as Fu'ad Zakariyya says, has not taken too seriously the Islamic movements.⁴ But could he attack them too much without exposing himself to their violence? The following fact illustrates this problem.

In 1977, Egyptian periodicals and journals published projects of the Islamic penal law. In an interview, in April 1977, in a leftist Cairo periodical *Rose al-Youssof*, Zaki Najib Mahmud says that he "feels like he is living an ideological nightmare or a practical joke." The penalties proclaimed by these atavists (*salafiyyun*) are in opposition to the spirit of the time. He asks a question: "Who is going to amputate

¹ *Ibid.*, p. 228; see also Mahmud: *Thaqafatuna*, p. 96.

² Mahmud: *Tajdid al-fikr al-'arabi*, p. 294-295.

³ *Ibid.*, p. p. 195-196.

⁴ Zakariyya: *Al-haqiqah wal-wahm*, p. 141.

the hand of the thief? Is it the surgeon who had sworn to protect and to save people and to fix amputated hands, or the butcher?" But without being overtaken by pessimism, he adds: "I believe that practical life is far stronger than the adepts of mummified ideas. Reality will end up being imposed on them."¹

The periodical *Al-Islam* published in its issue of 1977 an article of four pages with the headlines in red. The author of the article accuses Zaki Najib Mahmud of having made fun of God's law. Responding to his question, he says: "We assure the doctor that the one who should amputate the hand of the thief will be the surgeon. But it will be the butcher who will cut the tongues of the disobedient rebels among the philosophers, the men of letters and the artists."²

Zaki Najib Mahmud responded in the columns reserved for him in *Al-Ahram*, the 16 July 1977, in an article entitled: "Dialogue with children." In it he says: "The author thinks he has the right to judge the conscience and the heart of people. He disseminates his judgments, calling others atheists and disbelievers, without any consideration. This shows that he has no confidence in his own faith [...]. Yet, he knows that each one is responsible, as he is himself, before God [...]. This ideological paralysis spreads when people are struck by the insufficiency of their capacity to reason and by the weakness of their intellectual life in general." He asks himself what use would it be to have the tongue cut by the butcher: to liberate Jerusalem, to put an end to ignorance in Egypt, to find employments for thousands of unemployed people? He finishes with these words: "But woe to me, what am I saying? Since when was dialogue with children useful?"³

Zaki Najib Mahmud acknowledges that a question continued to resound in him like a tormenting spirit; what should be done to revive religion so that it becomes a propellant force again? He acknowledges, however, that he neglected it because of his incompetence in this domain. A very serious acknowledgement on the part of a philosopher of his calibre, followed by a declaration of faith: "I firmly believe that the way out of our civilizational decadence in which we have found ourselves for a long time, in view of matching with the rest of humanity as partners and not as followers, will only realize itself if the catalysts come from religion and the means from science."⁴

He criticizes Muslim trends which continually disparage sciences and push people towards ignorance, as is the case for the great orator Al-Sha'rawi (d. 1998).⁵ He reproaches Roger Garaudy, a French thinker who converted to Islam, of having diffused among the Muslims the idea that the West is endowed with scientific means, but has no objectives, the reason for which he converted, and not because of religious conviction. His ideas are counter-productive in the Arab world which, even if it has the objectives, lacks the means. Garaudy calls upon the Arabs to reject current modernity. Yet, instead of turning away from the current era, like

¹ Rose al-Youssof, 11 April 1977, p. 30.

² *Al-I'tisam*, May 1977, p. 18-21.

³ *Al-Ahram*, 16 June 1977, p. 9.

⁴ Mahmud: *Hadha al-'asr*, p. 239.

⁵ Mahmud: *Qiyam min al-turath*, p. 156-159.

Garaudy had done with regard to the Western civilization, it is necessary to add to this civilization what it lacks.¹

Zaki Najib Mahmud reproaches the Islamists of two things:

- They limit themselves to the five pillars of Islam: the profession of faith, prayer, the pilgrimage, fasting and legal alms-giving, forgetting the essential elements which are part of the Muslim space, the walls of the Muslim house, namely action. Does the Koran not say: "It is he who made the earth submissive to you. So walk among its slopes and eat of his provision" (77/67:15)? God asks of us, not to wander around, but to till the earth in order to get from it our livelihood. And this is as much God's order as are the five pillars of Islam. Some read the Koran and chant it out of devotion. Yet, there is another devotion which is more important, that of putting it into practice, through action and science.² The revealed Koranic verses command reading: "[...] By your most honourable Lord, who taught by the pen. He taught the human what he did not know" (1/96:1-5). There are two books which should be read: the Koran revealed by God, and the World created by God. Science is therefore part of devotion.³
- They take to violence: "We do not reproach the extremists of having chosen such and such a stance through which they affirm their opinions and their positions. No, on the contrary, this is a sign of maturity. Similarly, we do not reproach them of trying to convince others of sharing in their stance, since such a tentative is the proof that they sincerely believe in what they think. What we reproach them of is nothing other than the terror that they exercise against others in order to force them to accept their belief. It is this violence that is the core of their extremism."⁴ He offers the following advice to the extremists: "I am not asking you to change what is deep inside of you. All that I am asking of you is to think each time you meet another person who is faithful to his religion, with some differences in his concept and interpretation, that this person practices his religion in the way he learnt it, believing that this is the right path. In that case, either you leave him alone in what he believes, through his own conscience, or you discuss with him calmly and in a fruitful manner."⁵

8) Husayn Fawzi

Husayn Fawzi (d. 1988) is an Egyptian free thinker, a scientist, an author of several works. He occupied several academic and cultural functions. He was a presenter of classical music at Cairo Radio.

During the Egyptian intellectuals' meeting with Kaddafi on the 6 April 1972, he told him that modern societies cannot be led by religion. "That personal conviction intervenes in the domain of human relations, it does not pose any problem. But that religion becomes the element that directs modern society, is to be excluded. Each one keeps to himself his relationship with God and his apostles. But that cannot

¹ *Ibid.*, p. 126-132.

² Mahmud: *Ru'yah islamiyyah*, p. 60-62.

³ *Ibid.*, p. 24-33.

⁴ *Ibid.*, p. 264.

⁵ *Ibid.*, p. 268.

signify that a people moving towards a new civilization should be obliged by principles or norms of conduct established during periods other than theirs. What my reason does not admit, I cannot admit it, however much pressure the government exerts on me. My reason is the guide and master, at the bottom of my heart."¹ In fact, he rejects every form of revelation. When I met with him the 8 September 1977, he told me that God created the world in six days and that he rested on the 7th day, and continues since then to rest. By consequence, all the prophets who came after the 6th day cannot have been sent by God. He declared to me, however, that it would not be easy to present such views to people. The government does not have any other means than to prevaricate. As for the arguments of the fundamentalist trend, it is necessary to respond to it saying that the situation has changed. Supposing that God may well have revealed the Koran, he cannot have revealed something immutable. It is necessary to re-adapt his revelation to modern life.²

9) Attacks of Islamists against lay people

As can be imagined, the above-mentioned ideas are not accepted by the Islamists. The latter do not hesitate to qualify the adepts of secularism as atheists, disbelievers, traitors.

Muhammad Moro, founder of the Movement of Muslim *Jihad*, wrote in this regard a book whose title says a lot: "Laïcs et traîtres" (Secularists and traitors).³ The fourth page of the cover ends as follows: "Consciously or unconsciously, the secularists prepare the ground for the colonial domination on the cultural, political social and civilizational levels. By consequence, they are traitors." The author rejects the idea of the historicity of the Koranic text, thus breaking the link between the Koran and our time and advocating the abolition of the Koran.⁴ He considers that colonialism did everything possible to avoid the application of Islamic law and to replace it with Western laws so as to weaken the capacity of the Muslim world to confront it, and not because Islamic law has been sclerosed and incapable of evolving, as the secularists say.⁵

In a debate between Fu'ad Zakariyya and Salim Al-Bahnasawi about Islam and secularism at the University of Kuwait, a participant proposed that the title be changed to "debate about Islam and atheism," for, he said, secularism is atheism in complete opposition to Islam.⁶ Al-Bahnasawi reproached the secularists for giving the parliament the right to dictate laws in the domains regulated by God's law. The parliament cannot allow what has been forbidden by Islamic law such as the marriage of a Muslim woman to a non-Muslim, according to the example given by Al-Bahnasawi.⁷ Hence the rejection of the concept of western democracy.⁸

¹ *Al-Ahram*, 7 April 1972, p. 6.

² For more information about the position of this philosophy, see Aldeeb Abu-Sahlieh: *L'impact de la religion*, p. 134.

³ Moro: *Ilmaniyyun wa-khawanah*.

⁴ *Ibid.*, p. 49.

⁵ *Ibid.*, p. 170-171.

⁶ Al-Bahnasawi: *Al-Islam la al-'ilmaniyyah*, p. 66.

⁷ *Ibid.*, p. 105.

⁸ *Ibid.*, p. 64-65.

In a book dedicated to attacking chiefly Professor Fu'ad Zakariyya, Al-Qaradawi writes:

Secularism considers that it has the right to establish laws for society, and that Islam has no right to govern and to legislate, to say what is licit and what is illicit. In so doing, secularism usurps the absolute power of God in the domain of legislation and confers it on human beings. It thus renders man equal to God his creator. Moreover, it puts man's word above the word of God, giving him the power and competence confiscated from God. Man becomes in this way a god governed by what he wants [...]. Secularism accepts positive law, which has neither history, nor roots, nor general acceptance, and challenges Islamic law which the majority considers to be divine, equitable, perfect and eternal.¹

Al-Qaradawi adds:

A secularist who refuses the principle of the implementation of Islamic law is a nominal Muslim. He is undoubtedly an apostate. He must be invited to repent, by explaining to him, with clear proofs, the points that he doubts. If he does not repent, he is then to be condemned as an apostate, deprived of his association with Islam - or of his "Muslim nationality" so to speak, he is to be separated from his wife and his children, and the norms foreseen for recalcitrant apostates, in this life and after his death, should be applied to him.²

The Islamic *Fiqh* Academy which depends on the Organization of the Islamic Cooperation issued the following *fatwa* concerning secularism during its meeting held in Manama from the 14 to the 19 November 1998:³

- 1) Secularism (which signifies the separation between religion and life) came into existence as a reaction against abuses committed by the Church.
- 2) Secularism was diffused in Muslim States by colonial forces and their collaborators and under the influence of orientalism. It divided the Muslim world, spread doubt about its correct beliefs, distorted the brilliant history of our nation, created the illusion in the current generation that there exists a contradiction between reason and the texts of the *Shari'ah*, worked on the replacement of our Noble *Shari'ah* by positive laws, propagated licentiousness, the dissolution of morals and the destruction of noble values.
- 3) Secularism has given rise to the majority of destructive ideas which have invaded our countries under different names: racism, communism, Zionism, Freemasonry, etc. This has led to the loss of the riches of the nation and to the deterioration of the economic situation and has contributed to occupation in some of our countries like Palestine and Jerusalem (*sic*), which proves its failure to realize the least good for our nation.
- 4) Secularism is a system of positive law based on atheism which is opposed to Islam in its totality and in its details. It goes hand in hand with world Zionism

¹ Al-Qaradawi: *Al-Islam wal-'ilmaniyyah wajhan li-wajh*, p. 118-119.

² *Ibid.*, p. 73-74.

³ Arab text in <http://www.moia.gov.bh/010a.htm>.

and its licentious and destructive doctrines. It is, by consequence, an atheist doctrine rejected by God, his Messenger and his believers.

5) Islam is religion, State and a complete way of life. It is the best for all times and for every place. It cannot accept the separation between religion and life, but it demands that all the norms should derive from religion and that practical life should be coloured by Islam in the domains of politics, economics, society, education, information, etc.

The academy demands that political Muslim authorities "protect Muslims and their countries against secularism and take necessary measures to warn them against it."

The hostile attitude towards non-Islamic law was highlighted at the end of the 19th century by Savvas Pacha, a Christian author who held the position of Minister of Foreign Affairs in the Ottoman Empire. In his *Étude sur la théorie du droit musulman* (Study of the theory of Islamic law), he wrote:

A Muslim, like any other person, commits sin; he commits crime, he becomes the least of men; but he never ceases to be a Muslim. True abjuration is not known in Islam. A Muslim submits himself to a non-Islamic law; he tolerates it as long as he is not in a position of power. According to a fundamental dogma of the legislation, the dogma of constraint, his impotence absolves his conduct of the character of abjuration; but as soon as the power that renders the constraint effective ceases, a Muslim considers himself obliged to shy away from any action of a law which has been imposed on him without being demonstrated as being in conformity with the word of God and with the conduct of the Prophet. If he continues to obey a non-Islamic law, after the power exerting the constraint has been weakened, he should believe himself menaced by eternal fire.¹

Elsewhere, he wrote:

A Muslim shall accept with eagerness and gratitude every progress coming from Europe, whether its objective is science, industrialization, public works or any other branch of the human knowledge, as long as it is demonstrated to him, through Islamically correct arguments, that progress is not contrary to his religion. The passive resistance posed thus far by the Muslim inhabitants of European colonies to the efforts of their Christian governments or free thinkers, is solely due to the fact that it was neglected to explain to them that our truths are not contrary to what God revealed to them through his Messenger [Muhammad]. Yet, it is necessary, either in order to conquer the resistance of the Muslim masses, or in order to prevent it from being born, to demonstrate that the recommended measures do not contravene in any way the sacred law of Muhammad. This is possible, easy even, for those who know Islamic law.

Civilized States must not allow themselves to be accused of violating without necessity and without winning the consciences, to strike and fill with venom the multitudes of Muslims. Why allow such a grievous state of minds to be perpetuated?

¹ Savvas, Part I, p. XXVII.

The simple and practical means for finding a remedy for such a grievous situation, and putting a stop in future to such a great evil from happening in the immense regions of the Asiatic and African continents where our civilization is striving to penetrate, is the Islamisation of the European laws that Muslims are now being made to accept.¹

To summarize the opposition between the secularists and the Islamists, we can say that the latter start with the premise that Islamic law is perfect because it comes from God. Those opposed to Islamic law are, by consequence, enemies of God, disbelievers, atheists who must be put to death. As for the secularists, they challenge the above mentioned premise and consider that Islamic law is too circumstantial, human, imperfect and unadapted a law to govern our times. The fact of refusing its implementation during our time does not therefore signify necessarily the rejection of religion.

Chapter II.

Implementation of Islamic law outside Muslim countries

I. Abode of Islam and Abode of War

Classic Muslim jurists consider as Abode of Islam (*dar al-islam*) all the regions that have come under the Muslim domination, whether the inhabitants are Muslims or not. On the other side of the border is found the Abode of War (*dar al-harb*), often called Abode of disbelief (*dar al-kufr*) which, one day, should come under the Muslim domination too, and its inhabitants should eventually convert to Islam.

Before the departure of Muhammad from Makka, the Koran used to order Muslims not to have recourse to war, even when they were attacked:

Endure! Your endurance is only by God. Do not be saddened for them and do not be distressed because of what they plot (70/16:127).

Those who endured seeking their Lord's face, performed the prayer and spent, secretly and publicly, from what we provided them, and repel evil with good, they will have the final home. They will enter the gardens of Eden, with the righteous among their fathers, wives and descendants. The angels will enter unto them from every door (96/13:22-23).

After the departure from Makka and the creation of the Muslim State in Medina, Muslims were authorized to fight those who were fighting them (87/2:190-193 and 216; 88/8:61; 103/22:39-40). Finally, they were allowed to engage in war (113/9:3-5).² The objective of war was to extend the Abode of Islam and to convert the inhabitants to Islam. Muhammad wrote messages to different leaders of his time, asking them to become Muslims. If they were monotheists and desired to remain so, they were to submit themselves to the political power of Muslims and pay a tribute. If they refused to convert or to submit and to pay, they were to prepare

¹ Savvas, Part II, p. IX-X.

² These steps were exposed by Mawlawi: *Al-usus al-shar'iyyah*, p. 33-47.

themselves for war. If they were not monotheists, they only had the choice between conversion and war.¹

The Abode of War can benefit from a temporary treaty of peace, thus becoming Abode of treaty (*dar 'ahd*). According to Abu-Yusuf (d. 798), the Grand Judge of Baghdad, "it is not allowed for the representative of the *imam* to grant peace to enemies when he maintains over them superiority of forces; but if in so doing he only wanted to lead them with gentleness to conversion or to become dependence, there is no harm in doing so until things get sorted out on their side."² Abu-Yusuf is only paraphrasing the Koran: "Do not weaken and do not call for peace whereas you are the most elevated" (95/47:35).

Three centuries later, Al-Mawardi (d. 1058) cites among the duties of the Head of State:

Fight those who, after having been invited to embrace it, refuse to embrace Islam, until they convert or become dependent on this objective of establishing God's laws by giving them superiority over every other religion.³

He specifies that if the adversaries convert to Islam, "they acquire the same rights as ourselves, they are subjected to the same duties as ourselves and continue to remain masters of their territories and their property." If they ask for mercy and call for a truce, it will only be accepted if it is too difficult to conquer them and on the condition of making them pay; the truce must be as short as possible and not go beyond a duration of ten years; because a period that goes beyond this delay becomes valueless.⁴

Ibn-Khaldun (d. 1406) distinguishes between a war conducted by Muslims and one conducted by adepts of other religions. It is legitimate for the Muslims to conduct an offensive war due to the fact that they have a universal mission aiming at bringing all the populations into the fold of Islam, willingly or reluctantly. This is not the case for the adepts of other religions who do not have a universal mission; they can only conduct war to defend themselves.⁵

Professor Abdelmajid Charfi, however, contests this classical concept which claims to be in conformity with the Koran. He considers that the latter only prescribes defensive war. He relies for that on the opinion of the jurist Sufyan Al-Thawri (d. 778) who used to cite in this regard the following verses: "If they combat you, then kill them" (87/2:191) and "Combat the associators all together, as they combat you all together" (113/9:36). But this opinion was overturned by the dominant opinion according to which the command to fight was revealed progressively, ending up imposing war through the initiative of the Muslims.⁶ Thus, affirms the author, "*ji-had*, under its offensive and violent form, with the extremes which have been its

¹ See Hamidullah: *Documents*, vol. II, p. 21, 22, 34 and 41; Hamidullah: *Majmu'at al-watha'iq*, p. 110, 116, 145, 162.

² Abou Yousof: *Le livre de l'impôt foncier*, p. 319.

³ Mawardi: *Les statuts gouvernementaux*, p. 31.

⁴ *Ibid.*, p. 98-105.

⁵ http://www.muslimphilosophy.com/ik/Muqaddimah/Chapter3/Ch_3_31.htm.

⁶ Al-Sarakhsi: *Sharh kitab al-siyar al-kabir*, vol. I, p. 187-188.

consequences, carried the day over freedom of conscience and the call to a better life."¹

II. Classical religious boundary and migration

In order to escape from persecutions, Muhammad, accompanied by some of his adepts, left Makka, his native town, in 622 and headed for Yathrib, known as Medina, his mother's town. It was the beginning of the Muslim era known as the era of Hegira, era of the migration. Those who left Makka to go to Medina came to be known as *muhajirun* (immigrants). Those who came to their aid were called *ansar*.

Some Muslims, however, remained in Makka and continued to secretly live according to their faith. Constrained to participate in the fight against the troops of Muhammad, some lost their lives. The dramatic incident is evoked in the following passage which reproaches them of staying back in Makka:

[To] those, oppressors to themselves that the angels take away, [the angels] will say: "What were you in?" They say: "We were weakened on the earth." [The angels] will say: "God's earth was not ample [enough] so that you may emigrate thereto?" Those, gehenna will be their shelter. How evil is the destination! Except the weakened from the men, the women and the children, who were not able to find means, and were not guided in the way (92/4:97-98).

The passage prescribes for every Muslim living in the country of disbelief, to leave his country in order to join the Muslim community, if he can. Other verses go in the same line (92/4:100; 113/9:20). The objective of this emigration is to take refuge from the persecution, to weaken the disbelieving community and to participate in the war efforts of the new community. Thus, the Koran speaks collectively of *those who believed, emigrated and struggled in God's way* (87/2:218; 88/8:72, 74 and 75; 88/8:20; 70/16:110).

Verse 88/8:72 establishes an alliance between the immigrants and those who give them hospitality. It forbids forging such an alliance with Muslims who remain in the country of disbelief "until they emigrate." Nonetheless, if these Muslims who have remained outside the community "ask you for succor in the religion, you must succor, except against people with whom you have a commitment."

Verse 92/4:89 asks of the Muslims to trust the disbelievers only once they have emigrated towards a new Muslim community, as a sign of allegiance and conversion. The Koran shows a great mistrust towards the nomads, the eternal migrants without a fixed home who used to declare their allegiance to Muhammad and later go back into the desert (*ta'rib*), thus escaping from his control, in the critical moments when the new community needed warriors to defend itself and to expand (113/9:97; 113/9:90, 99, 101, 120 and 106/49: 14).

The immigrants had left all they had behind and were asked to break every relationship with the disbelievers, including family relations (113/9:23). They found themselves in total destitution. They were thus supposed to be taken charge of by the other members of the community. The Koran encourages the rich to help them (102/24:22). The agreement established by Muhammad between the immigrants,

¹ Charfi: *L'islam entre le message and l'histoire*, p. 128-129.

the *ansars* (those who were coming to their aid) and the Jews who were found in Medina, affirms that the three groups constituted one single community.¹ The Koran dedicates a part of the war booty to the immigrants and even gives them precedence over the residents (101/59:8-10). It establishes a fraternity among the believers (106/49:10; 89/3:103; 113/9:11) entailing successional rights,² rights later reserved to close relatives (90/33:6).

Classic Muslim jurists consider that migration towards the Abode of Islam will continue as long as the division between the Abode of Islam and the Abode of disbelief persists. They cite the words of Muhammad which say: "Migration towards the Muslim community will never come to an end as long as the disbelievers are fought."³ Every Muslim found in the Abode of disbelief must emigrate towards the Abode of Islam. He can only remain there if he is capable of living according to Muslim religious norms or if he is not capable of emigrating due to sickness, weakness or constraint.⁴ Ibn-Qudamah (d. 1223) writes that even if a Muslim can accomplish his religious duties, within the Abode of disbelief, it is preferable that he emigrates towards the Abode of Islam in order to participate in the *jihad* against the disbelievers and to increase the number of Muslims.⁵ And if Muslims living within the Abode of disbelief must migrate towards the Abode of Islam, even more so the classic Muslim jurists take a dim view of the migration of the Muslims from the Abode of Islam towards the Abode of disbelief. They care very little about them.⁶ Also Al-Jurjani (d. 1413) defines migration as "the fact of bringing to an end one's stay among disbelievers and becoming integrated in the Abode of Islam."⁷ This is the only meaning of migration admitted by the classic jurists.

Supported by the authority of Malik (d. 795), Ibn-Rushd (d. 1126), the *imam* of the Mosque of Cordoba and grandfather of Averroes, affirms that the obligation to migrate will be maintained up to the day of resurrection. He cites the verses 92/4:97-98 and 88/8:72 and the hadith of Muhammad: "I have nothing to do with every Muslim who lives among the polytheists." The Muslim convert in the Abode of disbelief must emigrate towards the Abode of Islam so that he can live under Muslim norms. Certainly, a Muslim cannot render himself into the Abode of disbelief, for he would have to live under the laws of disbelievers. He can only render himself there if it is for recapturing a Muslim who has fallen captive. Should he go there voluntarily for any other reason, he cannot preside over prayer and his testimony should be rejected. Ibn-Rushd asks of the Muslim authority to install check-points on the roads so that no one should render himself into such countries, particularly if he carries with him what is forbidden and could embolden the disbelievers

¹ Hamidullah: *Al-watha'iq al-siyasiyyah*, p. 59.

² This reminds us of the first Christian community (Acts of Apostles 4:32-34).

³ Al-Nasa'i, hadiths 4102 and 4103.

⁴ Al-Shafi'i: *Kitab al-um*, vol. 4, p. 169-170.

⁵ Ibn-Qudamah: *Al-mughni*, vol. 10, p. 514-515.

⁶ For more information see Khadduri: *War and peace*, p. 170-174.

⁷ Al-Jurjani: *Al-ta'rifat*, p. 257.

in their war against the Muslims. God, he says, has fixed for each one a destiny which he will reach and the riches that he will obtain.¹

Implementing this doctrine of migration, Muslims have left countries which had been reconquered by the Christians. Thus, in 1091 the reconquest of Sicily was achieved after a Muslim occupation of about 270 years. A good number of Muslims left the island in order to take refuge on the other side of the Mediterranean. Imam Al-Mazari (d. 1141, in North Africa), a native of Mazara, in Sicily, responding to the Muslims living in Sicily, reminded them of the prohibition of staying in the Abode of disbelief. The rule, however, knows some exceptions:

- The stay in the country of an enemy out of an imperious reason.
- A voluntary stay undertaken out of ignorance that such a stay is forbidden.
- A stay within the territory of the enemy whilst hoping to recover it from the hands of the occupiers and to restitute it to the Muslims, or arrive at putting the infidels on the right track, or, at least, to divert them from whatever heresy.²

With the capitulation of Toledo in 1085, the majority of Muslims left the town. Those who remained behind could maintain their life-style, their property, their usual places of residence, as well as their tax regime and their freedom of worship, through payment of a tribute.³ These Muslims were despised by those who had emigrated and by those who had not been conquered. They used to call them *ahl al-dajn* or *mudajjan* – and in Spanish *Mudéjar* – words used to qualify tamed or domesticated animals, in opposition to wild and free animals. A number of Muslims converted to Christianity, but they maintained their faith in secret, thus exposing themselves to the rage of the inquisition. They came to be known as the Moors. The tolerance of the kings of Spain with regard to their subjects, Jews as much as Muslims, did not last forever. After having decided to expel the Jews in 1492, they also decided to expel the Muslims, an expulsion that was fully achieved in the whole of Spain during the year 1610.⁴

The Moors, under Christian domination, used to hide their faith, by having recourse to the dissimulation mentioned in the Koran (89/3:28; 70/16:106) and of which we spoke above.⁵ Legitimizing such an attitude, a *fatwa* of the *mufti* Ahmad Ibn-Jumayra, dating the beginning of December 1504, accorded the Moors precise instructions in order for them to adapt themselves to a milieu that was hostile to them. Thus, if the Christians obliged them to insult the Prophet, they were to pronounce his name as Hamed, in the manner of the Christians and think, not of the Messenger of God, but of Satan or a Jew called Muhammad. If they were forced to go to church, during the time of prayer of the Muslims, they were exempt from the Muslim prayer and the Christian cult was to be counted in their favour as if they had accomplished the Koranic prescription, facing Makka. If they were impeded

¹ Ibn-Rushd: *Kitab al-muqaddimat*, p. 611-613.

² See Arab text and the translation of the *fatwa* of Al-Mazari in Turki: *Consultation juridique*, p. 697-704.

³ Quesada: *La population mudéjare*, p. 134.

⁴ *Chrétiens, musulmans et juifs dans l'Espagne médiévale*, p. 313 and 333.

⁵ See Part III, chapter, VI.III.

from performing prayer during day time, they were supposed to pray at night. The ritual ablution could equally be replaced. Depending on circumstances, they could plunge into the sea or rub the skin with a clean substance, earth or wood. If they were obliged to drink wine or to eat pork, they could do it, while knowing that it was an impure act and provided they condemned it mentally. If they were forced to renounce their faith, they were to be evasive, and if they were pressed, they were to renounce interiorly what they were forced to proclaim.¹

The preceding *fatwa* concerned Muslims who could not emigrate from their country.² As for those who could, Al-Wansharisi (d. 1508) is of the opinion, in a *fatwas* of 1484 and 1495, that they should not remain there.³ He considers that migration from the Abode of disbelief towards the Abode of Islam remains a duty up to the day of resurrection. Exempted from emigration is only he who cannot do it due to paralysis, captivity, serious illness or grievous weakness. He should, however, maintain the intention to emigrate as soon as that will be possible for him. He who refuses to emigrate abandons the community⁴ and approves of the superiority of disbelief over Islam. He will neither be able to accomplish prayer without the disbelievers deriding him – which is condemned by the Koran (112/5:58), nor the legal alms owed to the *imam* – an important element in Islam, nor the duty to fast during the month of Ramadan, nor the pilgrimage to Makka, nor *jihad*. The stay in the Abode of disbelief is contrary to the words of Muhammad which say: "A Muslim should not demean himself;" "The upper hand is better than the lower hand." Such a stay exposes the Muslims, particularly the weaker ones, the incapables and the women, to perversion in matters of religion. By remaining among the disbelievers, the descendants of the Muslims run the risk of being diverted away from their religion by the non-Muslims through marriages and to imitate their habits, their dress-codes, their bad customs and their language. Yet, if one loses the Arabic language, he loses the cult which is linked to it. Finally, Muslims cannot trust non-believers who can find pretexts to burden them with taxes and make them neglect their commitments.⁵

III. Today's religious boundaries

Nowadays, the national criterion has overtaken the religious criterion. After having suffered colonization, the Muslim world, particularly with the end of the Ottoman Empire and the suppression of the Caliphate in 1924, got divided into nation-states, often at war with one another, with a minimum of religious relationship, as for example the Organization of the Islamic Cooperation, an ineffective 'fire-fighter.' The ensuing States are now part of the UNO. We are currently faced with a new geopolitical situation to which contemporary Muslim authors endeavour to adapt the ancient divide between the Abode of Islam and the Abode of war.

¹ Cardaillac: *Morisques et chrétiens*, p. 88-90; Sabbagh: *La religion des Moriscos entre deux fatwas*, p. 49-53.

² Sabbagh: *La religion des Moriscos entre deux fatwas*, p. 53.

³ Al-Wansharisi: *Al-mi'yar al-mu'rib*, vol. 2, p. 133-134 and vol. 10, p. 107-109.

⁴ *Ibid.*, vol. 2, p. 119-133.

⁵ *Ibid.*, vol. 2, p. 137-141.

Abu-Zahrah (d. 1974) affirms that the current world is united only by one organization (UNO) whose members commit themselves to respect laws. The Koran demands in such a case the respect of all the commitments (50/17:34). For this reason, member States of this world organization cannot be considered the Abode of war, but as the Abode of the treaty (*dar 'ahd*).¹

Mawlawi writes that the Abode of Islam is the country where the Muslim norms are totally implemented. It would therefore be necessary to conclude that a good number of Muslim countries cannot be considered the Abode of Islam, for is it enough that a country implements Islamic family law to be considered Muslim? And if it does not do so, such as is the case for Turkey, would it be considered a non-Muslim country? Should the exercise of Muslim religious cults be taken as a criterion? In that case, what should be said about some non-Muslim countries where Muslims practice their cults more freely than in Muslim countries? These countries are not Islamic and yet there is very little difference with Muslim countries which do not implement Islamic laws and only allow cults. Mawlawi is of the opinion that non-Muslim countries which are not at war or which have treaties with Muslim countries are to be considered the Abode of treaty or Abode of mission (*dar da'wah*).²

Current Arab juridical works employ neutral terminologies, without religious connotation, but Muslim works often qualify non-Muslim countries as Abode of disbelief (*dar al-kufr*), and their inhabitants as disbelievers (*kafir*). Some Islamists would even want to rehabilitate the two notions of Abode of Islam and Abode of war and revert to holy war.³ Thus, article 2 of the constitutional model of Jarishah of 1984 enounces:

The Muslim community constitutes one Community. The best entity among those which compose the most pious; all the barriers – frontiers, nationalities (*qawmiyyat*) and spirit of the clan (*'asabiyyat*) – are null and void.⁴

The constitutional model of the Islamic Council of Europe of 1983⁵ affirms that the State which is meant to adopt this model is "a part of the Muslim world and Muslims found therein are part of the Muslim community" (article 2). It adds that "the unity of the Muslim community is one of the objectives whose pursuit by all means lies with the State" (article 72).

Muhammad addressed, through his adepts sent to take refuge in Abyssinia, a letter to the Negus of that country asking him to become a Muslim. The calling to enter

¹ Abu-Zahrah: *Al-'ilaqat al-duwaliyyah fil-islam*, p. 57. In the same line, see Al-Zuhayli: *Athar al-harb*, p. 108-109 and 195-196.

² Mawlawi: *Al-usus al-shar'iyyah*, p. 98-104.

³ We base ourselves on the different constitutional models established by the Islamists. According to their authors, these constitutional models are meant to replace the current Arab and Muslim constitutions of Western inspiration. The reader can find complete translations of the six Muslim constitutional models in Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, annexes 12-17, p. 522-569.

⁴ The text of this model can be found in Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, p. 566-569.

⁵ *Ibid.*, p. 557-565.

the fold of Islam remains a permanent concern of the Muslims. The constitutional model of the Islamic Council of Europe of 1983 says: "Society and State should be based on the following foundations: [...] to accomplish the obligation of transmitting the Koranic message and to invite [people] to embrace Islam" (article 3). The constitutional model of the Liberation Party of 1952 ruled that "the call to Islam is the principle task of the State" (article 10).¹ This remains, however, unilateral since every conversion of a Muslim to another religion is punishable by death. On the other hand, *jihad* is not excluded in the expansion of Islamic domination. The model of the Liberation Party stipulates: "*Jihad* is a duty for the Muslims" (article 90). The commentary specifies that one should start with calling the disbelievers to the Islamic faith. If they refuse to respond, they should be fought. It forbids treaties of absolute neutrality as well as the treaties of permanent delimitation of frontiers because that would signify the non-transmission of the Islamic faith and the end of *jihad*.²

IV. Religious boundaries and today's migration

The colonization of Muslim countries by the Western countries posed the same problems as after the reconquest of the Iberian Peninsula. Should Muslim countries occupied by foreign forces be considered as Abode of disbelief? If such was the case, was it necessary to emigrate and to go to Muslim countries? Al-Wazani (d. 1923), *mufti* of Fez, presents a *fatwa*, attributed to the judge Mawlay 'Abd-al-Hadi, forbidding the Muslims to remain under the protection of the disbelievers when they had the possibility to go to another country.

According to this *fatwa*, he who frequents homes of disbelievers loses his faith and his life here on earth and disobeys his Lord, for the Malikite school unanimously forbids Muslims from signing peace agreement with disbelievers unless under constraint. His testimony is challenged and he cannot preside over prayer. More serious is the situation of the one who engages in commercial deals with disbelievers. It is even more serious if someone, besides trading with them, gives them information undermining the Muslims; such a person must be considered a spy and condemned to death. The worst of all is the one who goes to them and indicates to them the way to dominate the Muslims: "Loving the disbeliever and hoping for his domination over the Muslims is a sign of disbelief; this constitutes apostasy."³

Al-Wazani also presents the *fatwa* of 'Abu-al-'Abbas Ibn-Zaki concerning a Muslim:

- who remains in his country which is occupied by the Christians and fights them;
- who, after conclusion of peace, remains in the country, considering that his presence is temporary without being constrained to pay tribute and, in case of the contrary, to escape towards a Muslim country;
- who has the intention to live in his country and to pay tribute to Christians.

¹ *Ibid.*, p. 528-540.

² *Ibid.*, p. 452-453.

³ Al-Wazani: *Al-nawazil al-sughra*, vol. I, p. 418.

The *fatwa* says that the first makes good use of his religion; the dust of his feet is a blessing. The second has committed a repulsive (*makruh*) act. But if he puts into action his intention to escape in case of constraint, he shall be saved, God willing. The third is worse; he lost his faith and his life here on earth; he deserves a capital punishment. And if he spies against Muslims, he deserves the death penalty. If he is found with Christians carrying weapons, he shall be dealt with like Christians: he can be killed and his property confiscated. Students and muezzins who remain under Christian domination are students and muezzins of doom: their testimony shall not be accepted and they cannot preside over prayer. They must repent when they leave the countries dominated by the Christians.¹

Al-Wazani affirms, as did the classic Muslim jurists, that migration from the Abode of disbelief towards the Abode of Islam is maintained up till the day of resurrection. The same goes for the country where evil and injustice reign. If one cannot find a just country, he has to choose the least evil. No Muslim can be exempt from emigrating from his country occupied by the disbelievers, unless it is impossible for him to do so due to illness or extreme weakness, whilst keeping the intention of leaving the country as soon as that will be possible.²

At the beginning of western colonization, some jurists and Muslim leaders had implemented the Muslim rule of migration. A non-negligible number of Muslims thus emigrated from North Africa to Turkey. In 1920, a big wave of migration took place from India towards Afghanistan, when the former was declared Abode of disbelief. The migration turned out to be catastrophic for the emigrants who later had to return to India weakened and frustrated. Hundreds among them died whilst leaving India and while returning.³

The majority of the Muslims were nonetheless obliged to remain and, together with their leaders and their teachers, they had to adapt to a new reality, in as much as the colonial regimes were tolerant, generally, in matters of religion. They allowed the Muslims to practice freely their religion, and to maintain and to implement their own laws through their own tribunals and their own judges over various social, civil and economic questions.⁴

Let us also point out that with the creation of Pakistan, Indian Muslims were faced with having to make the delicate choice of whether to remain in India or to go to Pakistan. Mawlana Abu-al-Kalam Azad declared in 1942 at the Indian National Congress: "I am proud of being an Indian. I am an integral part of this united and undivided nation [...]. I shall never renounce this right." After the independence, Azad was Minister of national education of the Indian government. Addressing himself then to the Muslim university students, he told them that if they were

¹ *Ibid.*, vol. I, p. 419.

² *Ibid.*, vol. I, p. 446. Concerning the French occupation of Algeria, see the *fatwas* solicited by the Emir 'Abd-al-Qadir and his opinion about this subject in 'Abd-al-Qadir: *Tuhfat al-za'ir*, p. 316-329, 384-393, 411-422 and 471-480. Concerning India and Algeria, see Peters: *Dar al-harb*, p. 579-587.

³ Masud: *The obligation to migrate*, p. 40-41. See the *fatwas* concerning India in Hunter: *The Indian Muslims*, p. 185-187.

⁴ Lewis: *La situation des populations musulmanes*, p. 29-30.

dreaming of living in Medina, the best would be to go to Pakistan, but if they chose to live in India they were to accept the situation of Makka, that is, to be a minority community.¹

Today, with the end of colonization, the opposite problem is posed, that of the migration of Muslims towards non-Muslim countries which colonized them before. Some of these Muslims have even acquired the nationality of these countries. There is also the problem of the citizens of the non-Muslim countries who have converted to Islam and that of the indigenous Muslim minorities who live in countries with a majority of non-Muslims, as is the case in the Balkans, in Israel or in the United States. Should all these Muslims be asked to leave the non-Muslim countries and migrate towards Muslim countries? Up to what point the Muslim norms should be maintained in a world which has replaced the religious frontier with the national frontier?

Some Muslim minorities in countries with a non-Muslim majority obtained their political independence, and others claim or will claim in the near future such an independence. While waiting for such a moment, we note among Muslim authors different tendencies referring to the classic Muslim teaching.

There are extremist Muslim groups which consider their own country as Abode of disbelief, due to the fact that these countries do not implement Islamic law in its totality. For them, every country which is not governed by Islamic law is an Abode of disbelief. For this reason, they recommend emigration, withdrawing into the mountains and preparing the conquest of such a country, as did Muhammad with Makka. This is in fact the name given by the Egyptian police to one such group: *Al-Takfir wal-hijrah* (anathema and emigration). The true name of the group is *Al-Jama'at al-islamiyyah* (the Muslim group), which means that the others are not Muslims. It is responsible for the different bombings in Egypt. Its ideologist Sayyid Qutb, was hanged by President Jamal 'Abd-al-Nasser in 1966. Qutb specifies in his commentary of verse 88/8:72 that migration was prescribed for the Muslim up to the day of the conquest of Makka. When Arabia was totally submitted to Islam, Muslims did not have to emigrate any more, since they were now in the Abode of Islam. Today, however, the Abode of Islam has gone back to the *jahiliyyah* (the pre-Islamic situation) and the power is no longer that of God, but that of the *Taghut* (the tyrant, the devil). It is a question of a new development for Islam and for the rehabilitation of the division Abode of Islam / Abode of emigration. The situation will last until Islam will have spread once again and there will be no place of migration left.²

There is also a trend which would like Muslim countries to open their frontiers to the migration of all the Muslims living in non-Muslim countries. The constitutional model of Jarishah of 1984 stipulates that the Head of State "opens the door of migration for the believers towards the Abode of Islam" (article 19). The constitution-

¹ Levrat: *Une expérience de dialogue*, p. 136-137.

² Qutb: *Fi dhilal al-Qur'an*, vol. III, p. 1560.

al model of the Islamic Council of Europe of 1983¹ gave every Muslim the right to have access to citizenship of a Muslim State (article 14). The second Muslim Declaration of Human Rights, published by the Council in 1981,² affirms in its article 23 (c):

The Abode of Islam (*dar al-islam*) is one. It is the homeland of every Muslim: nothing is authorized to put obstacles to his movements by the drawing of geographical barriers or political boundaries. Every Muslim country has the duty of welcoming every Muslim who immigrates into it or enters it, like a brother welcomes a brother: "Those who, before them, settled in the home and in the faith, love those who emigrate, do not find in their chests any desire for what they were given, and prefer [them] to themselves, even if they too are needy. Whoever is preserved from his own greed, those are the successful" (101/59:9).

Dwelling on the Koranic duty to immigrate, Al-Qalqili, the Grand *Mufti* of Jordan, explains that the duty was prescribed for two reasons:

- Muslims could not keep their faith in Makka before its conquest;
- the Muslim community was in need of men to participate in the effort of war against its enemies.

For him, emigration remains a duty for a Muslim when the two conditions are fulfilled. It is the case for a Muslim who has gone to America or any other country where he cannot practice his religion and, after his death, cannot have anybody to pray for him. Such a Muslim bears children who will abandon their religion and sometimes fight against the Muslim world and against the religion of their ancestors. The same goes for a Muslim needed by his country to participate in the fight. In the two cases, a Muslim has no right to go into such countries, and should he do so, he must emigrate. Al-Qalqili adds that if someone is constrained to leave his country, he must choose another country where there exists a Muslim community living in solidarity with one another to maintain the Muslim identity. Those who emigrate from their country towards regions where they lose their faith and bear disbelieving children commit a grave sin. They are people who prefer earthly life to the future life.³

The Guide for Muslims abroad, published by a Shi'ite Lebanese publishing house in 1990, deals with the prohibition of going into the Abode of disbelief. He cites the Koranic verses concerning this subject as well as a hadith of the Imam Al-Sadiq (d. 765) according to which there are seven grievous sins: voluntary homicide, false accusation of adultery, running away from the fight, the return to nomadism after the migration, unjustly squandering the property of the orphans, acceptance of usury and all that is punishable with hell by God.⁴ The return to nomadism refers to Bedouins who had converted to Islam at the time of Muhammad, but who would

¹ See the text of this model in Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, p. 557-565.

² *Ibid.*, p. 486-496.

³ Al-Qalqili: *Al-fatawa al-urduniyyah*, p. 7-12.

⁴ *Dalil al-muslim*, p. 15-20.

go back to the desert, losing the contact with the Muslim community and refusing to participate in its wars.

The work says that a Muslim must always feel that there is a barrier between him and the impure society of disbelievers. He cites to this effect, the Koranic verse: "The associators are only impurity" (113/9:28). The barrier should stop him from getting integrated into society. He should have the feeling that he is in a society which is not as just a society as his and that his presence in this disbelieving society is exceptional and dictated by the necessity from which he must as much as possible free himself: "For, what is worse for a Muslim than losing eternal life because of a temporal pleasure or a passing interest?"¹

The work, however, defends itself against cutting off the Muslim from the rest of the world; it only wants to vaccinate him against the defaults of the disbelieving countries. A Muslim has the choice between abandoning the Abode of disbelief or the spiritual vaccine. The objective of the work is therefore to help the Muslim to safeguard his identity and his purity in foreign countries.² Hence, it establishes the following principles:

- It is forbidden for the Muslim to go in the Abode of disbelief if there is the risk of harming his religion, whatever the objective of his journey: tourism, study, commerce or permanent stay. By harm to religion is meant every sin, small or big: shaving the beard, shaking hands with a foreign woman, abandoning prayer and fasting, eating impure food, taking alcohol, etc.
- If the risk of harming religion concerns only the woman and the children, the Muslim man must not take them with him. Because of this, the guide only speaks of the duties of the Muslim man and not the woman.
- If a Muslim is constrained to travel to the Abode of disbelief for medical reasons or for any other important reason whilst risking to cause harm to his religion, his journey is only allowed within the limits of necessity.
- In any case, it is preferable not to live among sinners or those who are in error, unless there is a valid reason. He who lives among sinners bears the maledictions that befall them. He who lives in a Muslim society benefits from the benedictions bestowed upon them.³

As for those who are constrained to travel to the Abode of disbelief, they must conform themselves to Muslim norms, norms which have been largely developed by the guide. Let us mention some:

- Accomplishing daily prayers, not to eat impure food, not to take alcohol and not to sit at the table where alcohol is consumed. Not directing oneself towards Makka when answering to the natural call due to the fact that toilets in the West do not respect this norm.
- Not to touch a foreign woman. Marriage with a pagan woman or one who has abandoned Islam is forbidden. Marriage with a Jewess or a Christian woman

¹ *Ibid.*, p. 29.

² *Ibid.*, p. 32-33.

³ *Ibid.*, p. 63-66.

must be preferably temporary. If the woman is a virgin, the permission of the father should be sought. In case of a divorce, it is forbidden to leave the children with the woman. Unless out of necessity, the woman must be treated by a woman doctor or nurse and a male patient by a male doctor or nurse when the treatment involves physical contact or seeing the private parts of the body ('awrah).

- Not to bury a Muslim in the cemetery of disbelievers except in case of necessity, where it is not possible to take back the body to a Muslim country.
- He is allowed to work in a supermarket on condition that he is not in charge of selling pork or alcohol. He is forbidden to sell or buy lottery tickets or musical instruments.¹
- For medical students: avoid mixing with women, and if possible, avoid being influenced. Not to touch the body of a woman and to look at her private parts only when this is part of administering a cure. Not to stare at a human body out of concupiscence. Not to practice on the corps of a Muslim, unless the life of a Muslim depends on it and if there is no non-Muslim corps.²
- Be concerned with converting disbelievers to Islam. This is a way of atoning for his fault of having left the Abode of Islam.³

The periodical of the *Saudi Commission of Fatwa* issued the following *fatwa* by Shaykh Ibn-Baz (d. 1999):

Question: Is it licit for a [Muslim] student to live in a family abroad in order to learn a foreign language?

Response: it is illicit for a student to live with families because he runs the risk of being contaminated by the morals of the disbelievers and their women. However, such a journey should be licit. It is in fact forbidden to travel into the Abode of disbelief to study there, except in case of extreme necessity and provided the student is lucid and prudent [...]. Muhammad said: "God does not accept acts of a Muslim if he frequents polytheists" [...]. He also says: "I have nothing to do with any Muslim who lives among polytheists." Many hadiths of Muhammad follow the same line. Because of this, a Muslim must avoid travelling to the Abode of disbelief, except in case of extreme necessity. Unless the traveller is lucid and prudent and ensures calling others to convert to Islam [...]. In that case, his journey is praiseworthy.⁴

Twice, the above mentioned periodical dedicated its editorial to warning against the sending of students to language courses organized in the West, with leisure programs and a stay in a family of disbelievers. The title says a lot about the content: "The warning against travelling to the Abode of disbelief and the dangers of such a journey to religion and to morals."⁵

¹ *Ibid.*, p. 69-79 and 83-89.

² *Ibid.*, p. 80-83.

³ *Ibid.*, p. 44.

⁴ *Majallat al-buhuth al-islamiyyah*, no. 27, 1990, p. 83-84.

⁵ *Majallat al-buhuth al-islamiyyah*, no 10, 1984, p. 7-10 and no 16, 1986, p. 7-10.

Because of the impossibility of forbidding Muslims to emigrate towards the Abode of disbelief, Al-Jaza'iri, a preacher of the Prophet's Mosque in Medina, recommends the creation of a commission of all Muslim countries with the objective of safeguarding the rights of Muslim immigrants in non-Muslim countries, with a budget funded through the participation of all the Muslim countries according to their capacity. The objective of the commission is to take measures aiming at "stopping Muslims from being integrated into the disbelieving and atheist societies." Among such measures:

- Building mosques in order to pray in them and to learn about their religion.
- Provide *imams* and books.
- Unite Muslims in order to create a single group which would be exclusively attached to the said commission.
- Organize religious teaching for the immigrants.
- Create cooperation among immigrants so as to be able to have their own butchery and cemetery.
- Create a committee of three religious scholars in every country of immigration whose task would be to resolve conflicts among the immigrants, conclude and dissolve their marriages, share out their inheritance in conformity with Islamic law, so as to avoid immigrants addressing themselves to non-Muslim tribunals. The committee must also create a solidarity fund in every mosque, establish economic laws and create deposit banks in accordance with Muslim norms.¹

Let us point out here that some Muslims living in Muslim countries claim for their coreligionists living in non-Muslim countries the implementation of Islamic law in matters of family law in the same manner as Muslim countries implement religious laws for the different Christian communities who live there. Ahmad Salamah, an Egyptian professor, writes in this regard:

Non-Muslim States, which pretend to be more civilized, do not grant Muslims who are among their citizens any special treatment in matters of family law, due to the fact that they are part of the public domain in which all are equal. In Islam, on the contrary, non-Muslims are subjected, in this matter, to the norms of their own laws. What a wonderful equality in Islam.²

Fuad Riad, another Egyptian professor, hopes to create a Muslim Family Code applicable to Muslims living in non-Muslim countries and who would opt for such a code. The code would be totally inspired by Islamic law in its contemporary interpretation which is the most conciliative with principles of universal values. The objectives would be "to enable the coexistence between members of the Muslim community and other communities by respecting the culture and legitimate interests of the growing Muslim community."³

The implementation of such a code, according to the professor in question, could be limited to Muslims living in Europe and to those whose link with their countries

¹ Al-Jaza'iri: *I'lam al-anam bi-hukm al-hijrah fil-islam*, p. 726-729.

² Salamah: *Mabadi' al-qanun al-duwali*, p. 172.

³ Riad: *Pour un code européen de droit musulman*, p. 380.

of origin has been broken. But it would not be applied to European Muslims or to Muslims not living in Europe whose relations remain close with their home countries. The unified code could avoid, in principle, the major discriminations associated with Islamic law, namely discrimination because of sex and religion. Thus, it should:

- Avoid inheritance hindrance due to disparity of cult;
- Limit polygamy to special cases, in the way intended by the true spirit of Islamic law.
- Limit or subordinate the unilateral repudiation to conditions which bring it closer to the conditions of divorce, such that they do not ignore the rights of the defendant part.

In this way, adds the Egyptian professor, "one can elaborate a personal Muslim system on the basis of Islamic law which would allow Muslims living in the West to achieve their principle goal, which is to establish their identity without having to live in disharmony with the society in which they are called to integrate themselves."¹

The proposal of the two Egyptian professors is not new. For instance, we can read in the Symposium of Kuwait organized in 1980 by the International Commission of Judges, the University of Kuwait and the Union of Arab lawyers concerning human rights in Islam:

The Symposium recommends that all the States respect minority rights in the exercise of their cultural traditions and religious rituals, and the right to refer in their personal status to their religious convictions, and it recommends providing the necessary support to all initiatives that encourage this spirit and strengthen this orientation and outlook.²

The European Council of *Fatwas* and Research, created in London in 1997, currently composed of 38 members, of which the majority live in the West,³ published at the end of its second session held in Dublin in 1998, a final statement comprising a series of recommendations, successively reaffirmed during the third session held in Cologne in 1999. The second of these recommendations says, without any ambiguity:

The Council recommends for the Muslims residing in Europe to work tirelessly in view of obtaining from the countries in which they reside the recognition of Islam as a religion, as well as the exercise – for the Muslim religious minority in the manner of the other religious minorities – of all their rights related to the organization of personal status in matters of marriage, divorce and inheritance [...].

¹ *Ibid.*, p. 381-382.

² Aldeeb Abu-Sahlieh: *Les musulmans face aux droits de l'homme*, p. 500.

³ See the website: <http://www.e-cfr.org/>.

To this effect, the Council recommends that Muslims create legal institutions so as to be in charge of the organization of their personal status in conformity with dispositions of the Islamic legislation and respecting the laws in force.¹

The demand was reiterated in the final statement of the fourteenth session held in Dublin in 2005.² In the same line of thought, the Council said in a *fatwa* that Muslims must in principle address themselves, in their conflicts, only to Muslim judges. But as there does not exist as yet a Muslim jurisdiction in non-Muslim countries, the divorce between Muslims pronounced by a non-Muslim judge is applicable so as to avoid damages and disorder that would result from the lack of its recognition.³

Let us highlight a point of view of a Muslim from ex-Yugoslavia expressed in a doctoral thesis presented in Saudi Arabia. After having pointed out that the acquisition by a Muslim of the nationality of a non-Muslim country constitutes apostasy,⁴ the author indicates that one cannot apply to the Muslim minorities the Muslim norms which impose migration towards the Abode of Islam and forbid naturalization. In fact, members of these Muslim minorities do not willingly live under the non-Muslim domination, but they are constrained and acquire the nationality in spite of themselves in accordance with the *jus sanguinis* or *jus soli*. By consequence, they do not commit any sin since a constrained person is not guilty. Above all, these Muslims can be considered obliged, according to Islamic law, to accept the nationality of a non-Muslim country since the nationality is the condition for benefitting from vital rights and services of the State. But the author adds that these Muslims must keep in mind the idea that they are constrained to acquire the nationality, without which they would not have a dignified life. On the other hand, they must employ all the means at their disposal to spread Islam and stand ready when a Muslim State will be created to answer to its call and to immigrate.⁵

The author allows the Muslims to emigrate from a Muslim country to a non-Muslim country and to acquire the nationality under the following conditions:

- His country of origin does not need him.
- Such a Muslim cannot have in his country benefits equal to the ones provided by a non-Muslim country.
- He should not endanger the Muslims by his work.
- He should not commit what is illicit according to Islam.
- Together with his family, they must be secure and able to practice their religion without any danger.
- He can only ask for the nationality of a non-Muslim country if such a country does not offer employment to non-citizens.

¹ The European Council of *Fatwas* and research: Collection of *fatwas*, serial no 1, p. 39.

² See the Arabic text in <http://www.e-cfr.org/article.php?sid=138>.

³ <http://www.e-cfr.org/article.php?sid=63>.

⁴ Tupuliak: *Al-ahkam*, p. 79-82.

⁵ *Ibid.*, p. 82-86.

- He should have the intention to go back to his country of origin at the first opportunity.
- He should disapprove of the evil he commits through acquiring this nationality, at least in his heart.

The author in question cites the verse: "Whoever disbelieved in God after his faith [...], except who was forced while his heart is at rest on account of faith. But he who opened the chest to the disbelief, God's anger will fall on them and they will have a great punishment" (70/16:106). Yet, he says, it is allowed for the Muslim to declare himself a disbeliever in case of necessity in accordance with the doctrine of dissimulation. And even more so the Muslim can acquire a foreign nationality in order to safeguard his faith, his life, his property and his family. He also cites a hadith of Muhammad which affirms: "Countries are countries of God, and the believers are servants of God. Stay anywhere you feel at ease."¹ He responds to the objections that can be raised by the naturalization of Muslims:

- The marriage of a naturalized Muslim should be conducted according to civil law. The author responds that such a civil marriage is, however, conducted by Muslims only for the sake of form. As for the content, they are to have recourse to religious marriage before an *imam* or a religious official according to Islamic norms.
- The legacy of a Muslim shall be shared according to positive law, contrary to Islamic law. The author responds that a Muslim always preserves the right to take into account in his testament the implementation of Islamic law, depriving of succession those who are not provided for.
- A Muslim can be constrained to serve in a non-Muslim army, sometimes even against Muslims. The author responds that military service in most of the Western countries is voluntary and can be exchanged with a sum of money. On the other hand, Muslim minorities in Yugoslavia used to enrol in the army in order to learn how to use weapons. Most of those who were part of the Yugoslavian army escaped in order not to participate in the war against the Muslims.
- A Muslim can be subjected to positive laws that are contrary to Islamic law. The author responds that this is also the case for countries called Muslim countries which apply the positive law. A naturalized Muslim who is subjected to positive law has the benefit of the excuse of the constraint.
- Muslim children are educated according to programs based on disbelief without any link to Islam. The author responds that non-Muslim countries allow Muslims to educate their children in Muslim schools and centres.²

V. Naturalization of Muslims

In spite of the opposition of the Muslim doctrine, the migration of the Muslims towards Western countries is an inevitable phenomenon which Muslim countries cannot stop, unless they assure their nationals material security and sufficient intellectual freedom, which is far from being the reality today. The problem today is not

¹ *Ibid.*, p. 86-88.

² *Ibid.*, p. 88-91.

stopping Muslims from emigrating, but rather not to lose them definitely, notably through naturalization.

A work in Arabic published in Paris in 1988 and re-edited in 1993 was dedicated to naturalization. The title of the work speaks volumes: *Change of nationality is apostasy and treason*. Its author, most probably an Algerian, considers that a Muslim who opts for the nationality of a non-Muslim country is an apostate due to the fact that he will have committed an act forbidden by the Koran and the hadiths of Muhammad. He must therefore renounce this nationality in order that God can forgive him this sin. He who retains his new nationality and dies will have for fate, hell.¹

The author cites among the reasons that oblige Western countries to give their nationality to Muslims:

- Increasing the diminishing Western population. Yet, this reduces the number of Muslims.
- Exploitation of Muslims in order to improve the economic situation of non-Muslims. Yet, a Muslim should not accept to be exploited by a non-Muslim.
- Increasing attraction of Muslims to disbelief and atheism. Yet, this is a loss for the Muslims and a gain for the disbelievers and the atheists.²

He explains that a Muslim who obtains the nationality of another Muslim country, does not change his status, since all the Muslims are brothers. But a Muslim who obtains the nationality of a non-Muslim country, such as the French, English, American, German or any other nationality of a disbelieving and atheist country, such a Muslim becomes an apostate to whom repentance for three days and three nights should be proposed. If he regains his Muslim nationality, he will be safe. If he refuses, he is punishable by death. The author cites in this regard the hadith of Muhammad: "He who changes religion kill him;" "The shedding of blood of a person is allowed only in three cases: adultery by a married person, killing through the implementation of the law of retaliation and apostasy which consists in abandoning one's community." Consequently, the Muslim who acquires a non-Muslim nationality must be considered as having abandoned his religion and be treated as an apostate: his Muslim wife will be separated from him, his property will be confiscated in favour of the public treasury, and after his death no prayers will be said for him nor shall he be buried in a Muslim cemetery, in accordance with the verse: "Never pray over any of them who dies, nor stand at his tomb. They disbelieved in God and his messenger, and they died while being perverse" (113/9:84).³ The author then presents the proofs according to which naturalized Muslims become apostates:

- A Muslim who gets himself naturalized in order to benefit from the rights recognized by foreign countries accepts the implementation of the disbelieving

¹ Al-Jaza'iri: *Tabdil*, p. 20-21.

² *Ibid.*, p. 21-24.

³ *Ibid.*, p. 25-27.

laws instead of Islamic law. Yet, according to many Koranic verses, a Muslim who rejects Islamic law becomes an apostate.¹

- A Muslim who gets himself naturalized becomes an ally of the disbelievers and the atheists. Many Koranic verses forbid such an alliance, among which the following: "The believers should not take the disbelievers for allies besides the believers. Whoever does that will have nothing with God, unless you fear them. God warns you of himself. To God is the destination!" (89/3:28); "O you who believed! Do not take my enemy and your enemy for allies. Do you throw love to them, whereas they disbelieved in what has come to you of the truth?" (91/60:1). In accordance with these verses, it is forbidden for the Muslims to be allies of disbelievers, except if one fears them, thus he can have recourse to dissimulation in order to avoid them.²
- The Koran forbids Muslims to stay among non-Muslims. The author cites here some Koranic verses which encourage migration from the Abode of disbelief to the Abode of Islam. *A fortiori*, it is forbidden for the Muslims to acquire the nationality of a non-Muslim country.³
- A Muslim who becomes naturalized and stays in a disbelieving country exposes his children and his family to disbelief. He no longer has religion and resembles a feather the wind blows about. His sole objective is to fill his stomach and to satisfy his sexual desire. Such a Muslim becomes a member of the army of the enemy camp and fights his own Muslim brothers in order to satisfy the people from whom he obtained the nationality. Thus he breaks every bond with Islam. Muhammad said in this regard: "He who carries weapons against us is no longer one of us."⁴
- He who gets naturalized is a traitor of his people and his country. Yet, treason is forbidden by the Koran. Such a Muslim left his country, substitutes it with a disbelieving country and subjects himself to its laws instead of Islamic law.⁵

The author in question presents different *fatwas* from religious authorities which affirm that a Muslim's acquisition of the nationality of a non-Muslim country constitutes apostasy. These *fatwas* were issued during the French colonial domination of Algeria and Tunisia. The French authorities had at the time opened the way for the naturalization of the Muslims. Those who accepted the French naturalization were subjected to French laws. According to the author, the content of the *fatwas* has a general scope which goes beyond the colonial period insofar as it starts with the idea that naturalization implies submission of Muslims to a foreign national law. Yet, this constitutes apostasy for a Muslim.⁶

The author goes as far as asking citizens of non-Muslim countries who convert to Islam to renounce their nationality and to leave their countries in order to go to

¹ *Ibid.*, p. 31-44.

² *Ibid.*, p. 45-76.

³ *Ibid.*, p. 77-93.

⁴ *Ibid.*, p. 105-113.

⁵ *Ibid.*, p. 151-157.

⁶ See these *fatwas* in Al-Jaza'iri: *Tabdil*, p. 175-233.

Muslim countries. And if these countries refuse to welcome them, the new converts can challenge them through the verse: "But if they repent, perform the prayer and give the purificating [alms], then are they your brothers in religion" (113/9:11). On the other hand, God has eternally guaranteed migrants to find a place of refuge: "Whoever emigrates in God's way will find on the earth much shelter and amplex. Whoever leaves his house, emigrating to God and his messenger, and whom death overtakes, his wage will fall on God" (92/4:100). Every Muslim is therefore obliged to leave the Abode of disbelief, not to remain in the company of disbelievers and atheists and not to submit himself to their laws. He who does not do so disobeys God and Muhammad and is no longer a Muslim.¹ The author even refuses the idea of dual nationality and criticizes Muslim countries which admit it. He advances the following arguments against dual nationality:

- One with dual nationality submits himself to disbelievers and rejects Islamic law. Yet, this constitutes apostasy.
- Dual nationality is hypocrisy, forbidden by the Koran: "When they meet the believers, they say, "We believe," but when alone with their devils, they say, "We are with you. We are only mocking" (87/2:14). It is also ruse and deception, forbidden by Islamic law.
- One with dual nationality resembles disbelievers. Yet, Muhammad said: "He who resembles a group is part of it."²

Al-Jaza'iri, a preacher of the Prophet's Mosque in Medina, also examined the question of naturalization. He cites three *fatwas* on this subject:

- The *fatwa* of Shaykh Hamani, President of the Supreme Islamic Council of Algeria, considers the acquisition of the nationality of a disbelieving country as apostasy. The naturalized person cannot marry a Muslim woman, he is deprived of his inheritance, and he shall neither be washed nor buried in a Muslim cemetery.
- The Saudi *fatwa* no. 4801 of 1982 concerning an Algerian *imam* in France who wanted to know if he could acquire the French nationality. The *fatwa* affirms: "it is not allowed to willingly acquire the nationality of a disbelieving country due to the fact that this implies accepting its norms, submission to its laws, subjugation and alliance with such a country. Yet, it is clear that France is a disbelieving country as a government and as a people, and you are a Muslim. You are not therefore allowed to acquire the French nationality."
- The Saudi *fatwa* no. 2393 issued a year later concerning an Egyptian who got the Canadian nationality. The *fatwa* specifies: "It is not allowed for a Muslim to acquire the nationality of a country whose government is disbelieving because this is an alliance with disbelievers and an acceptance of their errors. As for the stay without obtaining the nationality, it is in principle forbidden for the following reasons:

¹ *Ibid.*, p. 95-103.

² *Ibid.*, p. 137-148.

- From what God says: "[To] those, oppressors to themselves that the angels take away, [the angels] will say: "What were you in?" They say: "We were weakened on the earth." [The angels] will say: "God's earth was not ample [enough] so that you may emigrate thereto?" Those, gehenna will be their shelter. How evil is the destination! Except the weakened from the men, the women and the children, who were not able to find means" (92/4:97-98).
- From what the Prophet says: "I have nothing to do with any Muslim who lives among polytheists," and other narrations that follow the same line.
- From the unanimity among the Muslims according to whom it is necessary to migrate from polytheist countries towards the Abode of Islam when that is possible.

But religious scholars can stay among the disbelievers in order to transmit to them Islam and to call them to convert to it, provided they do not fear perversion, and that there be the hope to influence them and to guide them."¹

Commenting on these *fatwas*, Al-Jaza'iri writes that, contrary to the Algerian *fatwa*, the two Saudi *fatwas*, whilst forbidding naturalization, do not consider the naturalized person a disbeliever.² He points out that with the expansion of secularism, religious affiliation has become a private matter. One can thus become British or French without becoming a Christian, and one can become Pakistani without becoming a Muslim. By consequence, he who acquires the nationality of a non-Muslim country whilst keeping his faith and respecting religious prohibitions does not become a disbeliever. Al-Jaza'iri adds that calling millions of Muslims living in countries of disbelief apostates does not resolve their problem, but it complicates it, all the more so as it is not possible to take back all the Muslims to Muslim countries. Faced with such an impossibility, he advocates for the creation of a commission of all the Muslim countries with the objective of safeguarding the rights of the immigrants and to stop them from going into disbelieving and atheist countries.³ We mentioned this commission in the previous point.

The problem of the acquisition of the nationality of a non-Muslim State by a Muslim was posed by the Islamic Centre of Washington to the Islamic Fiqh Academy which depends on the Organization of the Islamic Cooperation. The Academy had to decline giving the response to this question due to the divergences among its members.⁴

VI. Scale of priorities in the West

As we saw in the previous chapter, Muslims claim the implementation of Islamic law as part of their faith. But the integral implementation of the law not being possible soon, Al-Qaradawi recommends for them to establish priorities in their claims.

¹ Al-Jaza'iri: *I'lam al-anam*, p. 723-725.

² *Ibid.*, p. 725.

³ *Ibid.*, p. 726-729.

⁴ *Majallat majma' al-fiqh al-islami*, no. 3, part 2, 1987, p. 1104; see also p. 1103, 1113, 1119, 1129, 1149-1158 1327-1338, 1399.

We have also seen above that communities living in the West equally claim the application of Islamic law, but they face the opposition of the host countries which see in this a danger for their juridical system. Muslim religious leaders ask themselves which claim should be made first and which norm to momentarily forego while waiting for better days, in order not to exasperate the non-Muslim countries.

Let us take the question of the prohibition of the veil in public schools in France, over which Muslim religious authorities are divided.

The Shaykh of Al-Azhar, Muhammad Sayyid Tantawi (d. 2010), affirmed to the French Interior Minister Nicholas Sarkozy that "the veil is a divine obligation for the Muslim woman [...]. No Muslim, be he governing or governed, can be opposed to it." But, he continued, the obligation is valid only "if the woman lives in a Muslim country. If she lives in a non-Muslim country, such as France where the leaders would like to adopt laws opposed to the veil, it is their right." "I repeat: it is their right and I cannot oppose myself against them," he insisted, affirming, with the support of Koranic verses, that a Muslim woman who conforms to a law of a non-Muslim country should not fear the divine wrath. He added: "I would not allow a non-Muslim to intervene in Muslim matters, but, in the same way, I would not allow myself to intervene in non-Muslim matters."¹

This declaration, which fully satisfied Sarkozy, caused a strong reaction in Egypt. Those who were around the same table as Shaykh Tantawi were dismayed by this declaration and, led by 'Ali Jum'ah, the Grand *Mufti* of the Republic, they immediately started to refute his arguments. Faced with general indignation, Shaykh Tantawi had to leave the place immediately. At the beginning of January 2004, after the Friday prayer, a crowd of worshippers assembled in front of the mosque of Al-Azhar to ask for his resignation. In Lebanon, the influential Shi'ite dignitary Sayyid Muhammad Husayn Fadl-Allah asked for "apologies" from him.²

The most remarkable position is that of Al-Qaradawi, which we cited above. In the name of the European Council of *Fatwas* and Research which he presides over and in the name of Muslim dignitaries who represent 1,3 billion of Muslims in the world, he wrote on the 23 December 2003 to the French President, denouncing the prohibition of the veil in schools:

I am very surprised and I strongly condemn the fact of constraining a Muslim woman to flout her religion and to disobey her Lord who says in his Book: "Say to the believing women that they shall lower their looks and protect their sex. They shall not disclose their adornment except that which appears thereof; and they shall draw their veil over their clefts" (102/24:31). "O Prophet! Say to your wives, to your daughters and to the women of the believers, to near on them their mantises" (90/33:59). The wearing of the veil is a religious duty for a Muslim woman which is sustained by the unanimity of all the Muslim schools of jurisprudence...

¹ AFP, 30 December 2003: <http://www.lefigaro.fr/france/20031230.FIG0181.html>.

² <http://www.st-nicolas-haguenau.com/spiritualite/spiritualite040125.htm>.

Not only does the prohibition of the wearing of the veil constitute a violation of the principle of freedom, but it equally contradicts the principle of equality, proclaimed by the French revolution, a principle that was approved by divine laws, international conventions and human rights. Such a prohibition signifies, in fact, that a practicing Muslim woman is the object of persecution and constraints, that she is deprived of her rights to education and the exercise of her profession, whereas facilities are provided for men or unpracticing Muslim women...

In democratic societies, the majority has the right to legislate as it so wishes. But a fair democracy is one which preserves the rights of the religious and ethnic minorities and does not oppress them, for want of which the minorities would be condemned to disappear in the name of democracy and the rule of the majority.¹

As for Muhammad Al-Sammak, a member of the National Committee for Muslim-Christian Dialogue, he defended the position of the Shaykh of Al-Azhar, considering interests and priorities, by referring himself to Al-Qaradawi himself. He does not deny that the veil is a Muslim duty for the woman and an expression of her faith, but he considers that the Muslims of France must respect the French laws which have been decided upon by the majority in order to safeguard national unity based on secularism. If a Muslim woman submits herself to it, because she is obliged, she does not commit any sin, in accordance with the verses 87/2:173 and 70/16:106. Nonetheless, if she insists on wanting to wear the veil, she must leave the country. Insisting on wanting to wear the veil in France risks endangering the entire Muslim community in France at the time when it is the object of a campaign of defamation. Faced with two evils, one should choose the least. He adds to the argument:

France has suffered criticism from the United States over its positions concerning the Middle-East, the Palestinian question, the Iraq war, while frantic and generalized accusations of terrorism flare up. Muslims, Arabs and Lebanese are grateful to France. Every position damaging the image of France is rejected.

Al-Sammak does not give in over the issue of the veil, he only postpones it to a more appropriate moment. He cites in this regard Shaykh Farhat Al-Munji, in charge of research at Al-Azhar: "If a Muslim woman must go to a non-Muslim country, she is confronted with the necessary situation which renders licit what is illicit. She can in this case remove the veil within the strictest limits until God will find a better situation for her."

There are also contradictory positions among French Muslims. Some see in the veil a mobilizing tool through which the community's identity can be affirmed before making other claims. They fear, moreover, that should they give in on this point, the French government will be encouraged to undermine what has already been acquired (ritual slaughter, religious cemeteries, etc.).

Totally different is the position of liberal Muslims who consider that the veil is a discriminatory symbol with regard to the woman and a prelude to the introduction

¹ <http://www.al-muslimah.com/forum/viewtopic.php?p=3954>.

of other Muslim demands. For this trend, giving in over the issue of the veil would only encourage the Islamists in their demands and risks to influence not only the life of women in France, but also that of those living in Muslim countries. Islamists of these countries could then oppose their leaders who refuse to implement Islamic law due to the fact that France is more respectful of Islam than them.

Part V.

Analytical legal table of the Koran

The Koran is the first source of Islamic law. It is not, however, easy to find one's way around it, the normative verses being dispersed in various chapters. The table aims at presenting an inventory of these norms classified in thematic order. To our knowledge, no work has ever established such a table.

Preliminary remarks

Contrary to the New Testament of the Christians, the Koran, first source of Islamic law, contains a great number of juridical norms. In this, it resembles the Old Testament of the Jews. Nonetheless, the norms are dispersed in several chapters and it is not easy for an uninformed person to find them.

The difficulty is partially resolved by the concordances and access to the internet. A great number of sites provide research motors by keywords as much for the Arabic version of the Koran as for the different translations. There exist also some analytical tables of the Koran, particularly in English. We can cite here as an example the following sites:

- <http://www.submission.org/quran/koran-index.html>.
- <http://www.islamicity.com/quransearch/>.
- <http://www.muslim.org/islam/q-index.htm>.

In Arabic, we only know of two summarized analytical tables in the internet:

- http://www.aliman-group.com/quran_index.php
- <http://www.islamology.com/quran/>

There exist on the contrary three written works:

- La Beaume: *Tabwib ay al-Qur'an al-karim min al-nahiyah al-mawdu'iyah* (see bibliography).
- 'Abd-al-Rahim: *Al-Tartib al-mawdu'i li-ayat al-Qur'an al-karim* (see bibliography).
- Muhammad: *Al-Fihras al-mawdu'i li-ayat al-Qur'an al-karim* (see bibliography).

These tables are general and list juridical norms only sporadically. Because of this, they are of little use to the jurists. The analytical table that we have established fills this lacuna. But in spite of our good will to make it as extensive as possible, we do not pretend to be exhaustive. Some remarks are inevitable in this regard.

- The Koran is the first source of Islamic law. The source is, however, completed by other sources admitted by the Koran, namely the *Sunnah* which comprises different collections. We limit ourselves in this table only to the norms mentioned in the Koran.
- The Koran comprises some purely juridical norms and others covering law, religion and morality. The distinction between the three elements is not always easy to discern.

- The Koran sometimes uses terms whose meaning is equivocal, giving rise to different translations. This does not help the classification of Koranic norms under clear rubrics. Because of this, we shall endeavour to provide Arabic terms between brackets. We start with the presumption that the terms used by the Koran have their proper meaning and are not synonymous, even if it is difficult to render in English the difference between some Arab terms.
- Some verses clearly state juridical norms, but Muslim jurists have managed to deduce some norms starting with unsuspecting verses, their concern always being to found their reasoning mainly on Koranic texts, using the least possible indication. We shall follow sometimes these verses with brief explanations.
- Koranic verses have been given different interpretations, following different schools of jurisdiction and trends of thought. We shall sometimes indicate such divergences. But it is not possible here to expose all the trends of the Islamic thought. Thus, we have left out esoteric interpretations.
- In order to establish an exhaustive analytical table, it would be necessary to review the writings of conservative and progressive authors in all the fields of law so as to highlight the verses which each one of them uses in favour of his arguments. This, however, would considerably expand the table which is intended to be simple to use.
- The Koran was established in a progressive manner and has known some evolution in matters of jurisdiction. Because of this, it contains many verses which have been abrogated by others, or even by the *Sunnah* of Muhammad. Muslim jurists are not, however, unanimous over the abrogated verses. For this reason, except for rare exceptions, we renounce distinguishing the abrogated verses from those that abrogate them.
- Many norms are repeated in different verses, sometimes with very little difference. We have tried to cite all these verses. This is part of the spirit of the Koran.
- The chapter numbering comprises two figures separated by a slash, the first one refers to the chronological order of the Azhar and the second one to the usual classification of the chapters. Hence, 72/14, in reference to Chapter Ibrahim, signifies Chapter 72 by chronological order and Chapter 14 according to the usual classification.
- The table is not alphabetical, but thematic. We have classified the different domains under the following twelve rubrics:

I. The religious vision of the world

II. Sources of Islamic law

III. General principles of law

IV. Political power

V. Pillars of Islam

VI. Family and Succession law

VII. Contractual law

VIII. Penal law

- IX. Fundamental rights
- X. Socio-economic law
- XI. Procedural law
- XII. International relations and law of war

I. Religious vision of the world

1) God is master of all

Heaven and earth belong to God: 87/2:107; 89/3:189; 112/5:17; 112/5:18; 112/5:40; 112/5:120; 39/7:158; 113/9:116; 102/24:42; 42/25:2; 41/36:83; 38/38:10; 59/39:44; 62/42:49; 63/43:85; 65/45:27; 111/48:14; 94/57:2; 94/57:5; 27/85:9.

Royalty (*mulk*) belongs to God, the true king (*al-malik al-haq*): 89/3:36; 55/6:73; 45/20:114; 103/22:56; 74/23:116; 42/25:2; 42/25:26; 43/35:13; 59/39:6; 60/40:60; 101/59:23; 110/62:1; 108/64:1; 77/67:1; 21/114:2.

Power, judgment (*hukm*) belong to God: 55/6:57; 55/6:62; 53/12:40; 53/12:67; 49/28:70; 49/28:88; 60/40:12.

God installed man as his lieutenant on earth (*khalifah*): 87/2:30; 55/6:133; 55/6:165; 39/7:69; 39/7:74; 39/7:129; 51/10:14; 51/10:73; 52/11:57; 102/24:55; 48/27:62; 43/35:39; 38/38:26; 94/57:7.

God has put everything on earth and in heaven at the service of man: 87/2:29; 72/14:32-33; 70/16:12-16; 103/22:65; 57/31:20; 63/43:12-13; 65/45:12-13.

2) Initial unity of a humanity submitted to God's law

Humanity was born from one being and was at the beginning one religious community (*ummah wahidah*) before being divided: 87/2:213; 87/2:253; 89/3:19; 51/10:19; 62/42:13-14.

- into different languages (*alsinah*) and colours (*alwan*): 84/30:22; 43/35:28.
- into different nations (*shu'ub*) and different tribes (*qaba'il*) so that they should know each other: 106/49:13.

Every nation (*ummah*) had its own messenger bearer of divine law: 51/10:47; 51/10:74; 70/16:36.

Some messengers are mentioned in the Koran, others not: 92/4:164; 60/40:78.

Every messenger is sent, speaking the language of his nation: 72/14:4.

Their message is authenticated by miracles: 39/7:104-108; 52/11:96-97; 89/3:49-50.

One should believe in all the Prophets and the messengers sent by God: 87/2:4-5; 87/2:136; 87/2:177; 87/2:285; 89/3:84; 89/3:179; 92/4:136; 92/4:150-152; 92/4:171; 112/5:59; 85/29:46; 62/42:15; 94/57:19.

One cannot be selective: believing in a part of the message and leaving out the rest: 87/2:85; 92/4:50; 52/11:12; 96/13:36.

The nations that preceded Islam have falsified their revealed laws: 87/2:75; 87/2:79; 87/2:174; 89/3:78; 112/5:13-15; 55/6:91; 39/7:162.

God would have united them again, but he did not want to: 87/2:213; 112/5:48; 51/10:19; 52/11:118; 70/16:93; 62/42:8.

The division of the communities is accepted by God, he will judge their differences in the next life: 87/2:113; 89/3:55; 112/5:48; 55/6:164; 51/10:93; 70/16:92; 103/22:17; 103/22:69; 75/32:25; 59/39:3; 59/39:46; 62/42:15; 65/45:17.

On the Last Day, God will judge every nation according to the message it received: 65/45:28.

Muhammad is the seal (*khatim*) of prophets and messengers: 90/33:40.

The message of Muhammad is universal, assembling all the communities around Islam, the only and authentic religion accepted by God: 89/3:19; 89/3:85; 39/7:158; 42/25:1; 58/34:28.

The other communities have refused to adhere to it: 87/2:120; 87/2:145; 65/45:28.

Call for a minimum unity of the communities around the belief in one God: 89/3:64.

II. Sources of Islamic law

1) Koran, the first source of law

The Koran is a follow-up to preceding laws revealed to preceding messengers sent by God: 89/3:3-4; 92/4:26; 112/5:48; 62/42:13.

The Koran is the last message and Muhammad is the last of the prophets: 90/33:40.

The Koran is in Arabic: 53/12:2; 96/13:37; 70/16:103; 44/19:97; 45/20:113; 47/26:195; 59/39:28; 61/41:3; 61/41:44; 62/42:7; 63/43:3; 64/44:58; 66/46:12.

Contrary to other messages, the Koran is not authenticated by miracles: 55/6:4; 55/6:35; 55/6:109; 55/6:124; 51/10:20; 96/13:7; 96/13:27; 50/17:59; 45/20:133; 73/21:5; 85/29:50; 84/30:58; 41/36:46.

It is authenticated by its inimitability: 87/2:23-24; 51/10:38; 52/11:13-14; 50/17:88; 76/52:33-34.

The Koran considers itself a complete work: 112/5:3; 55/6:38; 70/16:89.

It has been preserved by God from every falsification: 54/15:9.

It comes from an original copy preserved on tablets found with God: 96/13:39; 63/43:3-4; 27/85:21-22.

It can only be touched by those who are pure: 46/56:76-79.

It contains precise verses and equivocal verses: 87/2:119; 89/3:7; 52/11:1; 103/22:52; 59/39:23; 95/47:20.

It contains abrogated and abrogating verses: 87/2:106 (*nasakha*, *ansa*); 87/2:187 (*ahalla*); 89/3:50 (*ahalla*); 55/6:34 (*baddala*); 55/6:115 (*baddala*); 51/10:15 (*baddala*); 96/13:39 (*maha*, *athbata*); 70/16:101 (*baddala*); 69/18:27 (*baddala*); 45/20:126 (*nasa*); 103/22:52 (*nasakha*); 8/87:6-7 (*nasa*).

Interpretation (*ta'wil*) of the Koran 89/3:7; 92/4:59; 39/7:53; 51/10:39; 53/12:101; 69/18:78.

The words (*kalimat*) and norms (*sunan*) of God remain permanent and unchanging 55/6:34; 55/6:115; 51/10:64; 50/17:77; 69/18:27; 90/33:62; 43/35:43; 111/48:23.

2) The *Sunnah* of Muhammad, the second source of law

Koranic arguments of the partisans

Muhammad is inspired by God: 23/53:2-11.

The obligation to obey God and the Prophet: 89/3:32; 92/4:13; 92/4:59; 92/4:69; 112/5:92; 88/8:1; 88/8:20; 88/8:46; 113/9:71; 102/24:52; 102/24:54; 102/24:56;

90/33:33; 90/33:36; 90/33:71; 95/47:33; 111/48:17; 106/49:14; 105/58:13; 101/59:7; 108/64:12; 108/64:16.

Obedience to Muhammad is obedience to God: 92/4:80.

The duty of submitting oneself to the judgment of Muhammad: 92/4:65; 102/24:51; 101/59:7.

Prohibition to secede from Muhammad: 92/4:115.

God has given Muhammad the responsibility to transmit the Koran: 70/16:44.

Muhammad is a model: 90/33:21.

Muhammad is infallible: 55/6:84-90; 54/15:39-40; 23/53:2-4; 23/53:11 and 17.

Koranic arguments of the opponents

Hadiths of Muhammad are not true, they are fabricated: 55/6:21; 51/10:15; 53/12:111; 70/16:104-105; 57/31:6.

Following the narrations of Muhammad is a diversion from the path of God: 57/31:67.

The Koran constitutes the only true hadiths to follow: 57/31:6-7; 65/45:6-11.

Following the hadiths of Muhammad is disobeying God: 55/6:112; 42/25:31.

The hadiths have been inspired by the devil: 55/6:112.

God prescribes not to believe in other words other than in his: 39/7:185; 65/45:6; 33/77:50.

The hadiths of Muhammad are only speculations: 55/6:114-116; 23/53:23.

God ordered Muhammad to transmit the Koran only: 112/5:99-100; 51/10:15-18; 96/13:40; 62/42:48; 78/69:40-47.

God ordered Muhammad not to divert from the Koran: 50/17:73-75.

The Koran is the only source for religious teaching: 55/6:19.

Associating to the Koran other sources would be associating to God another divinity: 50/17:39. Yet, Muhammad is only a human being: 69/18:109-110; 61/41:6.

God has preserved only the Koran: 54/15:9; 61/41:41-42.

The Koran is complete: 55/6:38; 55/6:114; 55/6:115; 70/16:89.

The Koran says that Muhammad cannot guide anybody: 49/28:56.

3) The *Sunnah* of the companions (*sahabah*) and the followers (*tabi'un*)

Koranic arguments of the partisans

God is pleased with the companions and the followers: 113/9:100.

Those who fought first will be the first: 94/57:10.

The Muslim community is the best; enjoining good and forbidding evil: 89/3:110.

The Muslim community is a community of moderation which testifies: 87/2:143.

Koranic arguments of the opponents

The Koran encourages people to exert effort and not to imitate: 101/59:2.

A Muslim must obey the Koran and Muhammad (see above). Obeying the companions is making them to be legislators.

4) The *Sunnah* of the Household of the Prophet

Members of the Household of the Prophet are infallible: 90/33:33.

God prescribes obedience to the beholders of authority who, necessarily, cannot be mistaken: 92/4:59.

5) Laws of the preceding prophets

We have seen in the first rubric that the Koran acknowledges the messages of the prophets who preceded Muhammad. All have been sent by God, but their laws were falsified by their adepts. Muslim jurists accept from these messages only the norm cited by the Koran or the hadiths of Muhammad.

6) Rational effort (*ijtihad*)

Koranic arguments of the partisans

In case of conflict, refer to God and to the Prophet when speaking about interpretation: 92/4:59.

David and Solomon have the faculty to judge, in spite of the fact that only Solomon gave the right judgment: 73/21:78-79.

Muhammad made use of effort in judging according to what he had learnt: 92/4:105.

The Koran calls to reflect: 101/59:2 (see also below under "Analogy").

Koranic arguments of the opponents

The Koran regulates everything: 112/5:3; 55/6:38; 55/6:59; 70/16:89; 31/75:36

Whatever is not regulated by the Koran is subject to interpretation: 87/2:29; 112/5:101.

The Koran refers to God and to the Messenger in case of conflict: 92/4:59.

The Koran asks to judge according to the Book: 92/4:105.

The Koran says if the truth was in conformity to the passions of people, the world would be destroyed: 74/23:71.

Fatwa

The Koran demands to ask scholars of the Book questions: 70/16:43; 73/21:7.

The Koran frowns on him who follows the opinion of the ignorant: 112/5:104. A *contrario*, following the opinion of the learned is allowed.

The Koran exempts from war those who teach religion to others: 113/9:122.

The religious scholars are expected to be informed: 87/2:159 (see also "Transmission of knowledge" under the rubric X.6).

7) Consensus (*ijma'*)

Noah asked his people to consult one another in order to arrive at a common decision: 51/10:71.

Joseph's brothers consulted one another before throwing him into the pit: 53/12:15.

Being with those who say the truth: 113/9:119.

The Muslim community is a community of moderation which enjoins good and forbids evil, and is therefore infallible: 87/2:143; 89/3:110.

Not to be divided by clinging to God: 89/3:103, and to follow the path of the believers: 92/4:115.

God refers to the Koran, to Muhammad and to the proprietors of authority in regulating differences: 92/4:59; 92/4:83.

Only the consensus of the Companions of Muhammad is to be taken into account: 89/3:110.

Only the consensus of the four members of the family of Muhammad is to be taken into consideration (the daughter Fatimah, her husband 'Ali (d. 661) and their sons, Al-Hasan and Al-Husayn): 90/33:33.

8) Analogy (*qiyas*)

Koranic arguments of the partisans

God practices analogy: 65/45:21; 37/54:41-43; 110/62:5; 31/75:36-40.

God encourages men to reason and learn from what happened to other nations: 87/2:73; 87/2:242; 89/3:190; 55/6:151; 39/7:176; 39/7:184; 51/10:24; 70/16:44; 74/23:68; 84/30:8; 84/30:24; 58/34:46; 38/38:29; 60/40:82; 65/45:5; 101/59:2; 101/59:21; 77/67:10.

God sometimes motivates the norms: 87/2:222; 112/5:90; 55/6:145; 105/58:11; 78/69:10.

Koranic arguments of the opponents

Analogy is only a speculation, rejected by the Koran: 87/2:78; 55/6:116; 55/6:148; 51/10:36; 51/10:66; 50/17:36; 63/43:20; 65/45:24; 23/53:23; 23/53:28.

9) Unregulated interests (*masalih mursalah*)

Koranic arguments of the partisans

Islamic law aims at safeguarding the interests of the believers: 112/5:6; 73/21:107.

The Koran encourages doing good: 103/22:77.

The Koran allows violating norms in case of necessity (see rubric III).

But one should not break imperative Koranic norms in order to follow one's own passions: 112/5:49-50; 49/28:50.

Koranic arguments of the opponents

The Koran left nothing unregulated: 112/5:3; 55/6:38; 55/6:59; 70/16:89; 31/75:36.

10) Juridical preference (*istihsan*)

Koranic arguments of the partisans

The Koran foresees choosing the best of revelation: 39/7:145; 50/17:53; 59/39:18; 59/39:55.

The Koran prescribes not to be overburdened, which is the objective of juridical preference: 87/2:185.

Koranic arguments of the opponents

Practicing preference is obeying passion, choosing what is forbidden: 112/5:48; 112/5:49; 53/12:53; 49/28:50; 81/79:40.

Having recourse to juridical preference signifies that God left some aspects of life without regulation, which would be contrary to the Koranic affirmation: 112/5:3; 55/6:38; 55/6:59; 70/16:89; 31/75:36.

The Koran encourages referring to God and to Muhammad in case of conflict and not preference: 92/4:59.

Juridical preference is a divisive factor whereas God commands to be united: 89/3:105; 88/8:46; 62/42:13.

11) Presumption of continuity (*istishab*)

God created everything for man: 87/2:29.

12) Drawing lots

The seamen drew lots before throwing Jonas into the sea: 56/37:139-141.

Mary was entrusted to a guardian thanks to drawing lots: 89/3:44.

13) Custom (*'urf*)

The Koran prescribes economic relations between spouses in conformity with custom: 87/2:228; 92/4:19.

The Koran prescribes following the path of the believers: 92/4:115.

Custom ensures the welfare of the community, which is the objective of the Koran: 87/2:185; 89/3:104; 112/5:6.

Customs should not overshadow imperative religious norms. Ancestors could be mistaken: 87/2:170; 112/5:104; 39/7:28; 39/7:70; 39/7:173; 51/10:78; 52/11:62; 52/11:87; 52/11:109; 53/12:40; 57/31:21; 56/37:69; 63/43:22; 63/43:24.

One should not resemble disbelievers in adopting their customs: 87/2:165; 55/6:153; 101/59:19.

III. General principles of law

Revelation is indispensable because of differences among people: 70/16:64.

God alone establishes what is licit and what is illicit: 112/5:87-88; 113/9:37; 51/10:59; 70/16:116.

God decides in a free manner; his decisions should not be questioned: 73/21:23.

Man should not invent prohibitions other than what God has decided: 89/3:93; 55/6:138-140; 55/6:143-144; 55/6:150; 39/7:32-33; 70/16:35; 107/66:1.

All that is not forbidden by the Koran is permitted: 87/2:29.

Religious norms are meant to facilitate and not to burden the believers: 87/2:185; 87/2:233; 87/2:286; 92/4:28; 112/5:6; 55/6:152; 39/7:42; 103/22:78; 74/23:62; 99/65:4; 8/87:8; 9/92:7; 12/94:5-6.

Not to exaggerate in religion (*ghuluw*): 92/4:171; 112/5:77.

No sanctions without the law and prior warning. Hence the sending of prophets: 55/6:131; 113/9:115; 54/15:4; 70/16:119; 50/17:15; 47/26:208-209; 49/28:59.

Matching of the sanction with the offence: 87/2:178; 87/2:194; 112/5:45; 55/6:160; 51/10:27; 70/16:126; 103/22:60; 60/40:40; 62/42:40.

Individual Responsibility: 87/2:134; 89/3:30; 92/4:11; 55/6:52; 55/6:164; 51/10:41; 50/17:15; 85/29:12-13; 57/31:33; 43/35:18; 41/36:54; 59/39:7; 60/40:17; 76/52:21; 23/53:37-40; 82/82:19.

Responsibility over the faults of the person one misled: 70/16:25.

Responsibility according to capacity: 87/2:286; 55/6:152; 39/7:42; 74/23:62; 99/65:7.

Exemptions of the strict implementation of the law in case of:

- necessity (*darurah*): 87/2:173; 112/5:3; 55/6:119; 55/6:145; 70/16:115.
- constraint (*ikrah*): 70/16:106.
- illness (*marad*): 87/2:184-186; 92/4:43; 112/5:6; 113/9:91; 102/24:61; 111/48:17.
- weakness (*du'f*): 87/2:282; 92/4:97-100; 113/9:91.
- travelling (*safar*): 87/2:184-185; 92/4:43; 112/5:6.
- blindness (*'ama*): 102/24:61; 111/48:17.
- lameness (*'araj*): 102/24:61; 111/48:17.
- fear (*khawf*): 92/4:101.

Possibility of having recourse to ruse (*hilah*, *makhraj*):

- God provides the way out (*makhraj*) for the one who fears him: 99/65:3.
- Condemnation of the ruse of the Jews: 39/7:163.
- God is crafty: 87/2:9; 89/3:54; 36/86:15-16; 92/4:142; 88/8:30; 39/7:182-183; 48/27:50.

- The ruse of Abraham: 56/37:88-93.
- The ruse of Joseph: 53/12:76.
- The ruse of Job: 38/38:44.
- Ruse by allusion (*ma'radh*): 87/2:235.

Possibility of recourse to dissimulation (*taqiyyah*): 89/3:28-29; 53/12:4-5; 70/16:106; 69/18:19-20; 60/40:28; 106/49:13.

Respecting the principle of priority: 113/9:19-20.

Oblivion (*nisyan*) is forgivable: 87/2:286.

Error (*khata'*) is forgivable: 87/2:286; 69/18:73; 90/33:5.

Ignorance of the law is forgivable

- (*bi-jahalah*): 92/4:17; 55/6:54; 70/16:119; 106/49:6.
- (*ghafil*): 55/6:131.

IV. Political power

1) God is the source of power

Master of all, God grants royalty (*mulk*) to whomsoever he wishes: 87/2:247; 87/2:251; 87/2:258; 89/3:26; 92/4:54; 38/38:20; 38/38:35.

He gives power (*hukm*): 89/3:79; 55/6:89; 44/19:12; 65/45:16.

He gives wisdom (*hikmah*: attribute of power): 87/2:129; 87/2:151; 87/2:231; 87/2:251; 87/2:269; 89/3:48; 89/3:164; 92/4:54; 92/4:113; 112/5:110; 50/17:39; 57/31:12; 38/38:20; 63/43:63; 110/62:2.

He gives the book (*al-kitab*) containing the divine law for governing: 87/2:53; 87/2:87; 87/2:213; 89/3:48; 89/3:79; 92/4:54; 92/4:105; 92/4:113; 112/5:48; 112/5:110; 55/6:154; 52/11:110; 50/17:2; 69/18:1; 74/23:49; 42/25:35; 49/28:43; 85/29:27; 75/32:23; 61/41:45; 65/45:16; 94/57:25.

2) Forms of power

Tyranny

The tyrant is obeyed by those who ignore God's laws: 52/11:59.

God hardens the heart of the tyrant: 60/40:35.

Pharaoh is the embodiment of the tyrant (*taghiyah*): 87/2:49-50; 45/20:43; 81/79:17.

- He dupes (*istakhaffa*) his people; those who follow him are perverts 63/43:54.
- He persecutes: 87/2:49; 39/7:141; 49/28:4.
- He misleads his people: 45/20:79.

Muhammad should not impose himself like a tyrant: 34/50:45.

Oligarchy

God put the rich (*mutrafun*) into power in order to destroy cities: 50/17:16.

War booties must be distributed among the different categories of people so that they are not reserved only to the rich: 101/59:7.

Monarchy

Kings pervert cities and demean their populations: 48/27:34.

Tribal authority and that of the elders:

- Religion is above blood and tribal links: 113/9:24.
- It is forbidden to obey parents who advocate for polytheism: 85/29:8; 57/31:14-15.

- It is forbidden to align with disbelievers, even one's parents: 113/9:23-24; 105/58:22.

Authority based on religion is the only one tolerated by the Koran

Religion creates fraternity: (106/49:10).

It creates an alliance among the believers: 113/9:71.

Muhammad and the believers must implement the law dictated by God, and not to follow the passions (*ahwa'*) of people: 87/2:120; 87/2:145; 92/4:105; 112/5:45; 112/5:48; 112/5:49; 55/6:56; 96/13:37; 102/24:51; 49/28:50; 84/30:29; 90/33:36; 62/42:15; 62/42:21; 65/45:18; 95/47:14; 28/95:8.

Muhammad should not subject himself to the decision of the majority, which is not synonymous to truth: 55/6:116; 51/10:36; 52/11:116.

Muhammad must consult the people, but without legal force: 89/3:159; 62/42:38.

Imamate

The imamate belongs to the People of the Household of Muhammad: 90/33:33.

God prescribes the obedience to the holders of authority who are necessarily infallible, and therefore from the Household of Muhammad: 92/4:59.

God has appointed leaders, in order to guide people, who are necessarily infallible, and therefore from the Household of Muhammad: 75/32:24.

3) Conditions for the exercise of authority

Being a Muslim: 92/4:141.

Being a man: 92/4:34.

Being knowledgeable: 87/2:247; 53/12:55.

Having physical aptitude: 87/2:247.

Being worthy of trust: 53/12:55.

Respecting religious obligations (prayer and legal alms-giving): 103/22:41.

Enjoining good and forbidding evil: 103/22:41.

Having wisdom and the faculty to judge: 38/38:20.

Not being stingy: 92/4:53.

4) Duties of the head of State

Applying God's law (see above).

Govern with justice: 92/4:58; 92/4:105; 92/4:135; 112/5:8; 70/16:90; 38/38:26; 62/42:15.

Treat people with magnanimity:

- (*lana*): 89/3:159.

- (*khafada al-janah*): 54/15:88; 47/26:215.

Not to be rude (*fadhhdhan ghalidh al-qalb*): 89/3:159.

Consult people:

- (*shura*): 89/3:159; 62/42:38.

- (*fatwa*): 53/12:43; 48/27:32.

- The Head of State can decide against the opinion of the people: 89/3:159.

- The majority is not synonymous with truth: 55/6:116; 51/10:36; 52/11:116.

Not to dupe people (*istakhaffa*): 63/43:54.

5) Duties of the people

Pledging allegiance (*bay'ah*; *mithaq*): 112/5:7; 113/9:111; 111/48:10; 111/48:18.

Women can also pledge their allegiance: 91/60:12.

Obedying the holders of authority (*ita'at waliy al-amar*): 92/4:59; 45/20:90; 108/64:13.

Disobeying those who dupe: 63/43:54.

Disobeying those who neglect religion, pursue their passion and what is extreme: 69/18:28.

6) Unity through religion

The Muslim community is one, under a unique God: 73/21:92; 74/23:52.

It is united by religion: 89/3:103; 88/8:62-63.

It must avoid being divided into sects: 89/3:103; 89/3:105; 92/4:88; 92/4:115; 55/6:65; 55/6:159; 73/21:92-93; 74/23:53; 84/30:32; 63/43:65.

In cases of conflicts, it must refer itself to God and to Muhammad: 92/4:59.

It does not admit religious castes which legislate for it: 89/3:64; 113/9:31.

Opposition political parties are forbidden: there is the party of God: 105/58:22; and the party of the Devil: 105/58:19.

The Muslim community is the best of communities: 89/3:110.

It is a middle nation (*ummattan wasatan*): 87/2:143.

It is responsible for ordaining what is good and forbidding what is evil: 89/3:104; 89/3:110; 89/3:114; 39/7:157; 113/9:71; 113/9:112; 103/22:41.

It is a testimony (*shuhada' ala al-nas*) for the people: 87/2:143; 103/22:78.

If it abandons God and balks at fighting for religion, God withdraws authority from it and gives it to others: 113/9:39; 52/11:57; 95/47:38; 79/70:40-41.

God changes the situation of a nation only when the latter changes from within: 88/8:53; 96/13:11.

V. Pillars of Islam

The Islamic State is founded on religion and must pay attention to respecting the obligations imposed by the religion, among which are those called pillars of Islam:

1) Profession of faith (*shahadah*)

Professing that there is no divinity other than God appears several times in the Koran: 87/2:163; 87/2:255; 89/3:2; 89/3:6; 92/4:87; 55/6:102; 55/6:106; 39/7:158; 113/9:31; 113/9:128; 96/13:30; 95/47:19; etc.

Professing that Muhammad is the Messenger of God, who Muslims must obey: 89/3:101; 92/4:13; 92/4:14; 92/4:136; 112/5:33; 112/5:56; 39/7:158; 88/8:1; 88/8:20; 88/8:46; 90/33:40; 111/48:29; 106/49:7; etc.

2) Prayer (*salat*)

Prayer was also prescribed for the other religious communities. Thus, it was prescribed for Ishmael: 44/19:55; for Isaac and Jacob: 73/21:72-73; for the Jews: 87/2:43; 87/2:83; 112/5:12; 51/10:87; 45/20:14; and for the Nazarenes: 44/19:31.

A great number of Koranic verses impose prayer on Muslims by associating them with alms-giving (*zakat*) or charity (*anfaqu mimma razaqnahum*): 87/2:3; 87/2:110; 87/2:177; 87/2:277; 92/4:77; 92/4:162; 112/5:55; 55/6:72; 39/7:170; 88/8:3; 113/9:5; 113/9:11; 113/9:18; 113/9:71; 96/13:22; 72/14:31; 103/22:35; 103/22:41; 103/22:78; 102/24:37; 102/24:56; 48/27:3; 57/31:4; 84/30:31; 90/33:33; 43/35:29; 62/42:38; 105/58:13; 3/73:20; 100/98:5.

Prayer is prescribed also for women: 90/33:33.

The direction of prayer was first towards Jerusalem before being modified in favour of the Ka'aba: 87/2:144.

Whichever direction one faces, one is in the presence of God: 87/2:115.

The call to prayer: 112/5:58; 61/41:33; 110/62:9.

Purification before prayer: 92/4:43; 112/5:6; 113/9:108.

Touching women undermines the purity required for prayer: 112/5:6.

Encouragement to observe purity: 87/2:222; 4/74:4.

It is forbidden to pray in the state of drunkenness and impurity: 92/4:43.

The time of prayer: 87/2:238; 52/11:114; 50/17:78; 45/20:130; 102/24:58; 84/30:17; 98/76:25-26.

Respecting the time of prayer: 87/2:238; 55/6:92; 74/23:9; 79/70:22-23; 79/70:34.

Night prayer: 42/25:64; 75/32:16-17; 59/39:9; 67/51:17-18; 3/73:6; 98/76:26.

The Friday community prayer, a working day: 110/62:9-11.

Prayer of the day of sacrifice: 15/108:2.

Prayer of the end of Ramadan: 8/87:14-15.

Group prayer: 92/4:102; 39/7:29; 102/24:36.

Not to pray in a sectarian mosque: 113/9:107-108.

Praying at home: 51/10:87.

Recourse to prayer during a journey and during war: 92/4:101-103.

Praying while mounting or walking, in case of danger: 87/2:239.

The sick prays according to his capacity: 89/3:191; 39/7:42; 74/23:62.

Not talking during prayer: 87/2:238.

Rogations for rain: 87/2:60; 71/71:10.

3) Fasting (*siyam*)

Fasting is prescribed for the Muslims as it was for other communities: 87/2:187.

It takes place during the month of Ramadan, the month of the revelation of the Koran: 87/2:185.

It extends from dawn to sunset: 87/2:187.

It is forbidden to have diurnal sexual rapport during the period of fasting: 87/2:187.

He who cannot fast during the pre-set period due to illness or travelling, must compensate with an equal number of the missing days: 87/2:184; 87/2:185.

He who cannot fast must feed someone poor: 87/2:184.

See also rubric VIII.10.

4) Legal alms-giving (*zakat*)

The payment of legal alms-giving is part of the five pillars of Islam. See rubric X.1.

5) Pilgrimage (*hajj*)

Minor pilgrimage (*'umrah*): 87/2:196.

Major pilgrimage (*hajj*): 87/2:196; 112/5:2; 103/22:25-29.

Every Muslim with the capacity to do so must accomplish once, in his life, the major pilgrimage: 89/3:97.

During the pilgrimage one should avoid sexual rapports and quarrels: 87/2:197.

It is also forbidden to hunt: 112/5:1; 112/5:95; 112/5:96.

Specifications concerning the ritual: 87/2:158; 87/2:196-203; 111/48:27; 103/22:29.

Offering a sacrifice during the pilgrimage: 103/22:28; 103/22:33-34; 103/22:36-37; 15/108:2.

6) Holy war (*jihad*)

An important part of the doctrine considers holy war as the sixth pillar, or even the most important pillar of Islam since it is the protector of others. See rubric XII.

VI. Family and succession law

1) Status of the person

Formation of the foetus and the beginning of life: 89/3:6; 55/6:2; 39/7:12; 54/15:26-27; 54/15:30; 54/15:34; 70/16:4; 50/17:61; 69/18:37; 103/22:5; 74/23:12-14; 75/32:7-9; 43/35:11; 41/36:77; 56/37:11; 38/38:71-72; 59/39:6; 60/40:67; 23/53:32; 23/53:46; 97/55:14; 31/75:37-39; 98/76:2; 24/80:19; 36/86:6-7; 1/96:2.

The minimum duration of gestation is six months: 87/2:233; 66/46:15 and 57/31:14.

The child bears the name of the father: 90/33:5.

Capacity:

- Not to entrust property to an incapable (*safih*): 92/4:5.
- If he is a debtor: the guardian (*waliy*) dictates in his place: 87/2:282.
- Giving back property to the orphans (*yatim*) who have reached the age of marriage (*balagha al-nikah*) and discernment (*rushd*): 92/4:6.
- Management of the property of the orphans until they are major (*balagha ashaddah*): 55/6:152.
- Women can be seen by the pre-pubescent (*tifl*): 102/24:31.
- Access to the apartments by the pre-pubescent and pubescent (*hilm*): 102/24:58-59.
- The guardian decides for a weak debtor (*da'if*): 87/2:282.
- The weak is exempt from war: 113/9:91.
- The guardian decides on behalf of one incapable of deciding (*la yastati' an yam-li*): 87/2:282.

The age of full responsibility (*balagha ashaddah*) is 40 years: 66/46:15.

Illness (*marid*):

- Exemption from war: 113/9:91; 111/48:17.
- Exemption from fasting: 87/2:184-186.
- Can eat with relatives: 102/24:61.

Travelling (*'ala safar*): exemption from fasting: 87/2:184-185.

Blindness (*a'ma*):

- Can eat among his parents: 102/24:61.
- Exemption from war: 111/48:17.

The lame (*a'raj*):

- Exemption from war: 111/48:17.
- Can eat with parents: 102/24:61.

Pregnancy:

- The delay of waiting ends with deliverance: 87/2:228; 99/65:4.
- The husband must provide everything until deliverance: 99/65:6.

Menstruation:

- Sexual intercourse is forbidden during menstruation: 87/2:222.
- A divorced woman must observe a waiting period of three menstruations: 87/2:228.
- The waiting period of three months for one who does not have or no longer has menstruations: 99/65:4.

Menopause:

- A waiting period of three months for a woman in menopause: 99/65:4.
- A woman in menopause can take off her full dress (*thiyab*), but without exhibiting her finery: 102/24:60.

Widow:

- A waiting period of four months and ten days: 87/2:234.
- Not to be allowed marriage before the end of the waiting period: 87/2:235.
- The dying should leave for the widow a testament providing for a year of upkeep: 87/2:240.

2) Marriage

Recommendation of marriage

Monasticism has not been prescribed by God: 102/24:32; 94/57:27.

Not to deprive oneself of good things: 112/5:85.

Not forgetting one's share in this life: 49/28:77.

Encouragement of marriage: 92/4:1; 39/7:189; 96/13:38; 70/16:72; 84/30:21.

If one has no means for getting married:

- Should remain chaste: 102/24:33.
- Should marry a slave: 92/4:25.
- It is better to bear with: 92/4:25.

Conditions for marriage

Marriage is concluded through a firm commitment (*mithaq ghalidh*): 92/4:21.

Consent to marriage: 87/2:232; 87/2:234.

Permission of the master of the slave: 92/4:25.

A non-Muslim cannot be a guardian in a marriage of a Muslim: 92/4:141.

Capacity to marry: 92/4:6.

The divorced and the widow are free to remarry: 87/2:232; 87/2:234.

Impediments to marriage:

- Relationship of blood, of alliance and foster relatives (*rida'ah*): 92/4:22-23.
- Prohibition of marrying the father's wives: 92/4:22.
- Prohibition of marrying two sisters: 92/4:23.
- The wives of Muhammad are mothers of believers 90/33:6; they cannot be married: 90/33:53, since marriage with mothers is forbidden: 92/4:23.
- Muslims can marry wives of People of the Book, but the latter cannot marry the wives of the Muslims, a norm deduced from: 87/2:221; 92/4:141; 112/5:5 and 91/60:10.
- Prohibition of any form of marriage between Muslims and non-Muslims according to the Shi'ites: 91/60:10.
- Marriage between Muslims and polytheists is forbidden, a norm deduced from: 87/2:221; 92/4:141; 112/5:5; 91/60:10.

- Prohibition of marrying a married woman, unless she is a slave: 92/4:22; 92/4:24.
- Prohibition of marriage between Muslim women and polytheists: 91/60:10.
- Prohibition of marriage with a woman repudiated before another marriage: 87/2:230.
- Prohibition of marriage with a divorced woman during her waiting period: 87/2:235.

Marriage with slaves: 92/4:3; 92/4:24-25; 90/33:50; 90/33:52; 87/2:221; 102/24:32.

Marriage with orphans: 92/4:3; 92/4:127.

The male fornicator (*zani*) shall marry a female fornicator (*zaniah*) or a polytheist (*mushrikah*), and vice versa: 102/24:3.

The depraved (*khabith*) will marry among themselves, and the virtuous (*tayyib*) among themselves: 102/24:26.

Marriage with free women or slaves: 102/24:32.

The presence of two just witnesses (Muslims) for the marriage: 99/65:2.

Polygamy and polyandry

Polygamy of four: 92/4:3.

- Being just with the different wives: 92/4:129.
- Impossible to be just with all: 92/4:129.
- If one fears not to be just, marry only one: 92/4:3.
- Otherwise, marry slaves: 92/4:3.

Infinite polygamy of Muhammad: 90/33:50-51.

- Prohibition of taking other women, or to change wives, except slaves: 90/33:52.

Polyandry is forbidden: 92/4:24; 102/24:32.

- Marriage with a married slave is allowed: 92/4:24.

Marriage of pleasure or temporary marriage against payment (*zawaj al-mut'ah*): 92/4:24.

Abrogation of the marriage of pleasure according to the Sunnites by: 99/65:1; 112/5:5; 92/4:23; 92/4:12; 74/23:5-6; 79/70:29-30; 92/4:12; 92/4:3; etc.

3) Divorce

In case of bad conduct (*nushuz*) on the part of the husband: the couple should seek reconciliation: 92/4:128.

In case of bad conduct (*nushuz*) on the part of the wife: the husband should exhort her, distancing himself from her bed and to beat her until she obeys: 92/4:34.

In case of fear of separation (*shiqaq*): appoint an arbiter for each family and attempt reconciliation: 92/4:35.

The wives have the right to remain with their husbands or to be liberated by them in a good manner: 90/33:28.

Triple repudiation: 87/2:229.

Revocation of the divorce: 87/2:228; 87/2:229; 87/2:231.

Definitive divorce: 87/2:230; 87/2:231.

Divorce by comparing the wife with "the back of the mother" (*dhihar*): 90/33:4; 105/58:2.

- Repentance and expiation after such a divorce: 105/58:3-4.

Divorce by oath of sexual abstinence (*iyla'*): 87/2:226-227.

- Four months waiting period before becoming definitive: 87/2:226.
- Divorce by *li'an* (malediction) following the accusation of adultery without witnesses: oath requested: 102/24:6-9.
- Divorce by repurchase of freedom on the part of the wife: 87/2:229.
- Necessity of two just witnesses (Muslims) for the divorce or for taking her back: 99/65:2.
- Breaking of marriages between Muslims and disbelievers by giving them back the dowry: 91/60:10.
- Divorce liable to annulment during menstruation:
- Wives remain in the house of the husband except in case of wickedness: 99/65:1.
 - After the menstruation: taking back or divorce, in the presence of two witnesses: 99/65:2.
- Taking back of the wife by the former husband if she gets married to another man and divorces: 87/2:230.
- The waiting period for the woman
- After an unconsumed marriage: 90/33:49.
 - After the consumption: 87/2:228.
 - For the women in menopause: 99/65:4.
 - For an expectant mother: 99/65:4.
 - For the widow: 87/2:234.
- Treat kindly the divorced: 99/65:1-2; 99/65:6-7.

4) Economic relations between spouses

- The husband pays a dowry: 92/4:4 (*sadaqat*); 112/5:5 (*ujur*); 90/33:50; 91/60:10 (*ujur*).
- The dowry belongs to the wife, unless she agrees otherwise: 92/4:4.
- It is possible to pay a dowry in kind, norm deducted from: 49/28:27.
- Payment of fees (*ujur*) for the marriage of pleasure: 92/4:24.
- Payment of fees (*ujur*) to the parents of the slave one marries: 92/4:25.
- The fate of the dowry after the divorce:
- Not to be claimed back except with the accord of the wife: 87/2:229.
 - Not to impede the remarriage of the wife with the aim of taking advantage of the property she had received: 92/4:19.
 - Reimbursement by the woman in case of repurchase (*fī ma iftadat bihi*): 87/2:229.
 - In case of substitution of one woman by another: 92/4:20-21.
 - In case of divorce without consumption, payment of half of the dowry (*faridah*): 87/2:237.
 - Reimbursement to the disbelievers of the dowry they paid when their wives escape towards the Muslims: 91/60:10.
 - Reimbursement to the believing husbands of the dowry they paid when their wives escape towards the enemy: 91/60:11.
- Payment of a sum of consolation (*mut'ah*) in case of non-consumption and fixing of the dowry (*faridah*): 87/2:236.

Providing for lodging and the needs of the wife according to the means of the husband: 99/65:6-7.

Staying of the wife in the house of the husband, unless she commits a manifest depravity: 99/65:1; 99/65:4.

Providing for the needs of the pregnant divorced wife until her deliverance: 99/65:6.

Convenient allocation for the divorced: 87/2:241.

Allocation for the divorced widows through testament for a year, with a right to domicile: 87/2:240.

The woman is guardian of the property of her husband: 92/4:34.

Men and women have each their part of inheritance 92/4:7; 92/4:11; 92/4:32.

5) Other relations between spouses

Women have rights equal to their duties: 87/2:228.

Affection and goodness: 42/25:74; 84/30:21.

The duty to share nights among the wives (norm abrogated for Muhammad): 90/33:51.

The husband finds his comfort (*yaskun ilayha*) in his wife: 39/7:189; 84/30:21.

They are garments to one another: 87/2:187.

Women are a cultivation field for their husband; they can go there whenever they want: 87/2:223.

Forbidden sexual relations:

- During menstruation: 87/2:222.

- During the hours of the fasting of Ramadan: 87/2:187.

The husband must treat his wives with justice: 92/4:129, if not he should limit himself to one: 92/4:3.

The two spouses must consult each other concerning weaning: 87/2:233.

The wife should obey the husband: 92/4:34; 91/60:12.

The wife must not reveal the secrets of her husband: 107/66:3.

The husband must treat her wife according to usage (*bil-ma'ruf*): 87/2:228-229; 231; 92/4:19.

Not to forget mutual favours: 87/2:237.

Bad behaviour (*nushuz*):

- On the side of the husband: the couple should look for reconciliation: 92/4:128.

- On the side of the wife: the husband should exhort her, distance himself from her bed and beat her until she obeys: 92/4:34.

6) Relationship between parents and their children

Breast-feeding for two years: 87/2:233; 66/46:15; 57/31:14.

Breast-feeding by a divorced woman against payment, payable by the heirs: 99/65:6; 87/2:233.

Possibility of entrusting the baby to a child-minder for breast-feeding against a salary: 87/2:233; 99/65:6.

Food and clothes, the responsibility of the husband: 87/2:233.

Adoption (*tabanni*):

- Of Moses: 49/28:9.

- Of Joseph: 53/12:21.

- Adoption is forbidden: story of Zayd: 90/33:1-5; 90/33:36-40.
- The adopted child should not bear the name of the one who has adopted him: 90/33:5.

Support of close relatives (*dhu al-qurba*): 87/2:83; 87/2:177; 92/4:8; 92/4:36; 88/8:41; 70/16:90; 50/17:26; 102/24:22; 84/30:38; 62/42:23; 101/59:7.

Close relatives have priority in sustenance: 88/8:75; 90/33:6.

Respecting the parents: 87/2:83; 92/4:36; 55/6:151; 113/9:8; 113/9:10; 50/17:23-24; 44/19:14; 85/29:8; 57/31:14-15; 62/42:23; 66/46:15.

Affection of the mother: 49/28:10; 57/31:14; 66/46:15.

Respecting blood relations (*wasl al-arham*): 87/2:27; 92/4:1; 96/13:21; 96/13:25; 95/47:22-23.

God is above family relations:

- Not to obey parents if they advocate polytheism: 85/29:8; 57/31:14-15.
- Not to align with them if they are disbelievers: 113/9:23-24; 105/58:22.
- Not to ask for their forgiveness if they are disbelievers: 113/9:13.
- Not to be distracted by the children: 104/63:9.
- Wives and children are enemies: 108/64:14-15.
- They are useless in life: 74/23:101; 91/60:3; 79/70:11-14; 24/80:33-37.

Orphans: 87/2:83; 87/2:177; 87/2:215; 87/2:220; 92/4:6; 92/4:8; 92/4:36; 92/4:127; 55/6:152; 88/8:41; 101/59:7; 98/76:8; 10/89:17; 35/90:15; 11/93:9; 17/107:2.

- Not to touch their property: 92/4:2; 92/4:10; 50/17:34.

Incapables: 92/4:5-6; 87/2:282.

- Remuneration of the guardian: 92/4:6.
- Taking the witness for guardian: 92/4:6.
- Legal guardianship for a weak debtor: 87/2:282.

Bastard: 2/68:13.

7) Succession (*mirath*)

Priority to blood relations over relation to religion uniting the believers and the emigrants: 88/8:75; 90/33:6.

Shares: 92/4:7; 92/4:11-12; 92/4:33; 92/4:176.

Shares for the close relatives, needy orphans participating in the sharing: 92/4:8-9.

Prohibition of receiving as heritage women: 92/4:19.

Not to squander the heritage: 10/89:19.

Debts come before the sharing of the inheritance: 92/4:11.

8) Will (*wasiyyah*)

Making a will with the approaching of death: in favour of parents and relatives: 87/2:180.

Witnessing of the will: 112/5:106-108.

Alteration (*baddala*) of the will: 87/2:181.

Alteration for the sake of partiality on the part of the testator and for reconciliation: 87/2:182.

Will in favour of the widow granting her sustenance for one year: 87/2:240.

Gesture of goodness (*ma'ruf*) in favour of emigrants: 90/33:6.

The will between Muslims and the people of the Book who do not fight Muslims: 91/60:8-9.

Sharing of the heritage after the liquidation of the will and the debts: 92/4:11-12.

VII. Contractual law

1) Consent

Consent in contractual relations: 92/4:29.

2) Respecting the commitments

(*ahd*): 87/2:27; 87/2:40; 87/2:80; 87/2:100; 87/2:124; 87/2:177; 89/3:76; 89/3:77; 55/6:152; 39/7:102; 88/8:56; 113/9:4; 113/9:7; 113/9:12; 113/9:111; 96/13:20; 96/13:25; 70/16:91; 50/17:34; 74/23:8; 90/33:8; 90/33:15; 79/70:32.

Withdrawing from the commitment in case of treachery: 88/8:58.

(*wa'd*): 89/3:152.

(*mithaq*): 92/4:90; 92/4:92; 92/4:155; 88/8:72; 96/13:20.

(*'uqud*): 112/5:1.

3) Sale (*bay'*)

It is licit: 87/2:275.

Done in writing and in the presence of two witnesses: 87/2:282.

The sales contract involving two things delivered afterwards (*salam*), deduced from: 87/2:67-69.

4) Donation (*hibah*)

Licitness deduced from: 87/2:177; 92/4:4; 112/5:2.

5) Mandate (*wakalah*)

Appoint two witnesses for the reconciliation of spouses: 92/4:35.

Appoint people to collect the legal alms-giving: 113/9:60.

Contract of the mandate: 69/18:19; 103/22:55.

6) Guarantee

(*kafala*): 89/3:37; 89/3:44; 70/16:91; 45/20:40; 49/28:12; 38/38:23.

(*za'im*): 53/12:72; 2/68:40.

(*mawthiq*): 53/12:66.

7) Surety

(*rihan*): 87/2:283.

8) Drawing lots

Allowed for the good cause with:

- (*qalam*): 89/3:44.

- (*sahm*): 56/37:139-141.

Divination with arrows (*azlam*) is forbidden: 112/5:33; 112/5:90.

Game of chance (*maysir*) is forbidden 87/2:119 and 112/5:90-91.

9) Payment of a bonus (*ja'alah*)

7:113-114; 53/12:72; 47/26:41-42.

10) Usufruct of the totality of joint ownership

Licitness deduced from: 73/21:78; 37/54:28.

11) Deposit (*amanah*)

2:283; 89/3:75-76; 92/4:58; 88/8:27; 74/23:8; 79/70:32.

12) Debt (*dayn*)

Written and in the presence of two witnesses: 87/2:282.

If one is travelling and does not find a notary (*katib*), get a surety (*rihan*): 87/2:283.

The public treasury repays the debts of the one in debt (*gharim*) who cannot pay by himself without his fault: 113/9:60.

13) Loan (*'ariyah; i'arah*)

Licitness deduced from: 112/5:2; 50/17:7.

14) Interest (*riba: usure*)

Is of no benefit to God, unlike alms-giving: 84/30:39.

It is illicit, unlike sale, and is punished by God: 87/2:275.

It is illicit to expand on the capital through interest (*akala al-riba ad'afan muda'afah*): 89/3:130.

Interest for deferred payment (*riba al-nasi'ah*): 113/9:37.

God annihilates interest and increases alms (*yurabbi al-sadaqat*): 87/2:276.

Renouncing (*dharu*) the rest of the interest: 87/2:278.

Threat in case of refusal: 87/2:279.

Recuperation of the capital (*ra's al-mal*) in case of repentance: 87/2:279.

Granting a deferment (*nadhrah ila maysirah*) for one who is in difficulty (*dhu 'usrah*): 87/2:280.

As a preference replace interest with alms (*tasaddaqa*): 87/2:280.

The Jews are deprived of good food because of interest: 92/4:161.

15) Religious duty with regard to trade

Trade (*tijarah*), sale (*bay'*), leisure (*lahuw*), property and children should not make one forget prayer and alms-giving: 102/24:37; 110/62:9-11; 104/63:9; 3/73:7.

16) Enterprise contract

Story of Moses: 49/28:25-28.

God made people different in ranks so that some may employ others: 63/43:32.

Child-minder: 87/2:233.

Pay the mother who breast-fed the child: 99/65:6.

Paying of salaries (*ajr*): 69/18:77.

17) Society

4:12; 55/6:136; 55/6:139; 50/17:64; 45/20:30-32; 38/38:24; 59/39:29; 2/68:41.

18) Found objects

12:10; 49/28:8.

VIII. Penal law

1) General prohibitions

Respecting limits ordained by God (*hudud Allah*): 87/2:187; 87/2:229; 87/2:230; 92/4:113; 92/4:14; 113/9:97; 113/9:112; 105/58:4; 99/65:1.

Not to spread evil on earth (*fasad fi 'l-ard*): 87/2:11-12; 87/2:27; 87/2:30; 87/2:60; 87/2:205; 112/5:33; 112/5:64; 39/7:56; 39/7:74; 39/7:85; 39/7:127; 52/11:85; 52/11:116; 53/12:73; 96/13:25; 47/26:152; 47/26:183; 48/27:48; 49/28:77; 49/28:83; 85/29:36; 84/30:41; 38/38:28; 60/40:26; 95/47:22; 10/89:12-13.

Not to commit excess (*israf*) of every kind: 89/3:147; 112/5:32; 112/5:85; 55/6:141; 39/7:31; 39/7:81; 51/10:83; 50/17:33; 45/20:81; 59/39:53; 60/40:28; 60/40:34; 60/40:43; 64/44:31.

Not to commit injustice (*baghiy*): 55/6:145; 39/7:33; 51/10:23; 51/10:90; 70/16:115; 70/16:90; 103/22:60; 38/38:24; 62/42:39; 62/42:42; 106/49:9.

Not to commit wrong (*adha*): 87/2:263; 87/2:264; 89/3:186; 89/3:195; 55/6:34; 39/7:129; 113/9:61;14:12; 85/29:10; 90/33:53; 90/33:57; 90/33:58; 90/33:59; 90/33:69; 109/61:5.

Enjoining good and forbidding evil (*amr bil ma'ruf wa nahy an al-munkar*): 89/3:104; 89/3:110; 89/3:114; 112/5:79; 39/7:157; 113/9:67; 113/9:71; 113/9:112; 70/16:90; 103/22:41; 102/24:21; 85/29:29; 85/29:45; 57/31:17.

Help one another to do good, not evil: 112/5:2.

2) Harm to religion

Polytheism

The most unforgivable sin: 92/4:36; 92/4:48; 92/4:116; 112/5:72 (Nazarenes accused of polytheism); 55/6:56; 55/6:151; 39/7:33; 50/17:22; 50/17:39; 69/18:110; 57/31:13; 60/40:66; 66/46:5; 67/51:51; 91/60:12.

Having idols (story of Abraham): 55/6:74; 73/21:52-71; 47/26:70-77; 56/37:85-98.

Disobeying parents who push towards polytheism: 85/29:8; 57/31:14-15.

Invoking a name other than that of God in the mosque: 40/72:18.

Offering sacrifices to divinities: 55/6:136; 70/16:56.

Apostasy

Apostasy (*riddah*): 89/3:72; 89/3:86-89; 89/3:90-91; 89/3:167; 92/4:137; 112/5:54; 113/9:107; 90/33:14.

Forced apostasy is not punishable: 70/16:106.

God punishes apostates: 3/73:11; 4/74:11.

Apostasy is unforgivable 89/3:90.

Punishment of the apostate on earth: 87/2:217; 89/3:87; 113/9:74.

Repentance of the apostate: 89/3:89; 112/5:34; 113/9:5; 113/9:11.

Harm to freedom of worship

Destroying places of worship and forbidding praying there: 87/2:114.

Insulting the divinities of others: 55/6:108.

Entrance of non-Muslims in the mosques: 113/9:17.

Entrance of non-Muslims in the Ka'aba: 113/9:28.

Respect for the Sabbath by the Jews: 87/2:65; 92/4:154; 39/7:163; 70/16:124.

Falsification of sacred books

2:79; 87/2:174; 89/3:199; 112/5:44.

Contempt for sacred books, messengers of God and religion

(*sakhara*): 55/6:10; 73/21:41; 56/37:12.

(*istahza'a*): 87/2:231; 92/4:140; 112/5:57-58; 55/6:10; 113/9:64; 52/11:8; 96/13:32; 54/15:95; 70/16:34; 69/18:56; 69/18:106; 73/21:36; 73/21:41; 74/23:110; 42/25:41; 47/26:6; 84/30:10; 57/31:6; 41/36:30; 38/38:63; 59/39:48; 65/45:9; 65/45:35; 66/46:26.

(*khada*): 92/4:140; 55/6:68; 113/9:65; 55/6:91; 63/43:83; 76/52:12; 79/70:42; 4/74:45.

(*la'iba*): 112/5:57-58; 55/6:91; 113/9:65; 55/6:70; 39/7:51; 73/21:2; 63/43:83; 64/44:9; 76/52:12; 79/70:42.

(*dahika*): 63/43:47.

(*laha*): 55/6:70; 39/7:51.

(*lagha*: triviality): 74/23:3; 42/25:72; 49/28:55; 61/41:26.

Falsely attributing to God (iftara al-kidhb 'ala Allah)

3:94; 92/4:50; 112/5:103; 55/6:21; 55/6:93; 55/6:138; 55/6:140; 55/6:144; 39/7:37; 39/7:53; 39/7:89; 39/7:152; 51/10:17; 51/10:30; 51/10:38; 51/10:59; 51/10:60; 52/11:13; 52/11:21; 52/11:35; 53/12:111; 70/16:56; 70/16:101; 70/16:105; 70/16:116; 50/17:73; 69/18:15; 45/20:61; 73/21:5; 73/21:20; 74/23:38; 42/25:4; 49/28:36; 85/29:86; 75/32:3; 58/34:8; 58/34:43; 62/42:24; 66/46:8; 109/61:7.

Distinguishing among the prophets

2:4-5; 87/2:136; 87/2:177; 87/2:285; 89/3:84; 89/3:179; 92/4:136; 92/4:150-152; 92/4:171; 112/5:59; 85/29:46; 62/42:15; 94/57:19.

Oath

Not respecting one's oath: 89/3:77; 112/5:89 (expiation); 70/16:91-92; 70/16:94.

Respecting the pact concluded with God (*wafa' bi-ahd Allah*): 87/2:27; 87/2:40; 89/3:77; 55/6:152; 113/9:111; 96/13:20; 96/13:25; 70/16:91; 70/16:95; 90/33:15.

Swearing in the name of God: 87/2:224; 2/68:10.

Magic and sorcery

Magic taught by the devil: 87/2:102; 45/20:69.

Breathing on the knot: 96/13:4.

Drawing lots (see rubric VII.8).

3) Harm to life and physical integrity

Killing out of a just reason

He who kills one man is like one who kills the whole of humanity: 112/5:32.

Killing the prophets and those who enjoin justice: 87/2:61; 87/2:91; 89/3:21; 89/3:112; 89/3:183.

Spilling the blood of others: 87/2:84.

Being killed for a just reason: 55/6:151; 50/17:33; 42/25:68.

Intentional manslaughter, the penalty is hell: 92/4:93.

Killing disbelievers: 87/2:191; 92/4:89-91; 113/9:5; 113/9:111.

Retaliation law (qisas)

It is a way of surviving: 87/2:179.

As prescribed for the Jews: 112/5:45.

If someone aggresses, he can be aggressed in the same manner: 87/2:194; 70/16:126; 103/22:60; 62/42:40-41.

But forgiveness is praiseworthy: 62/42:40.

If someone is killed without reason, his guardian can avenge without exaggerating: 50/17:33.

A free man is killed for a free man killed; a slave for a slave, a woman for a woman; encouragement to pardon: 87/2:178.

Corporal punishment if illicit: application of the retaliation law (*qisas*): 112/5:45.

Unintentional manslaughter

Of a believer: freeing of a slave and blood price, unless renounced by the family of the victim: 92/4:92.

Of a believer belonging to an enemy side: freeing of a slave: 92/4:92.

Of someone belonging to the side of the enemy benefitting from a treaty: blood price and freeing of a slave or, in default, fasting for two consecutive months: 92/4:92.

Suicide: 87/2:195; 92/4:29.

Infanticide

Out of poverty (abortion?): 55/6:151; 50/17:31; 103/22:2; 91/60:12.

Sacrifice of children: 55/6:137; 55/6:140; 56/37:102.

Burying of living girls: 70/16:59; 7/81:8-9.

Circumcision

The partisans consider it a licit injury for the following reasons:

- Resembling Abraham 70/16:123; who had executed divine orders: 87/2:124.
- God's mark: 87/2:138.

The opponents consider it an illicit injury. They invoke:

- Perfection of God's creation: 89/3:6; 89/3:191; 96/13:8; 74/23:115; 42/25:1-2; 84/30:30; 75/32:6-7; 38/38:27; 60/40:64; 37/54:49; 108/64:3; 82/82:6-8; 28/95:4.
- Prohibition of the splitting of the ears of the animals: 92/4:118-119.
- Prohibition of the alteration of God's creation: 92/4:118-119.

4) Harm to public security

Harabah (insurrection; robbery)

5:33; 39/7:86; 85/29:29.

Penalty: death, crucifixion, amputation of the hand and the opposite leg or banishment: 112/5:33.

Pardon if he surrenders before falling into the hands of the authorities: 112/5:34.

The fight among the different Muslim factions (*baghiy*):

- Tentative of reconciliation: 106/49:9-10.
- Fighting him who resumes fighting after the reconciliation: 106/49:9.

Plotting:

- (*makara*): 89/3:54; 55/6:123; 39/7:123; 88/8:30; 53/12:102; 49/28:20.
- (*i'tamara*): 49/28:20.

Conspiring in secret

(*bayyata*): 92/4:81; 92/4:108; 92/4:114.

Allowed for a good cause: 92/4:114; 105/58:9.

(*asarra*): 113/9:78; 96/13:10; 45/20:60; 73/21:3; 63/43:79-80.

(*tanaja*): 113/9:78; 50/17:47; 45/20:60; 73/21:3; 63/43:79-80; 105/58:7-10.

(*istakhfa*): 92/4:108.

Poets opposed to power: 47/26:224-227.

5) Sexual offences

Allowed rapports

Remaining chaste: 92/4:25; 74/23:5; 102/24:30; 102/24:31; 102/24:33; 90/33:35; 79/70:29.

Rapports allowed only with:

- Spouses: 74/23:5-6; 90/33:50; 79/70:29-31.
- Slaves (*ma malakat aymanukum*): 74/23:6; 90/33:50; 90/33:52; 79/70:30.

Any other relationship is transgression: 74/23:7; 79/70:31.

Illicit sexual rapports in general (fahishah)

2:169; 87/2:268; 89/3:135; 92/4:15; 92/4:16; 92/4:19; 92/4:22; 92/4:25; 55/6:151; 39/7:28; 39/7:33; 39/7:80; 53/12:24; 70/16:90; 50/17:32; 102/24:21; 48/27:54; 85/29:28; 85/29:45; 90/33:30; 62/42:37; 23/53:32; 99/65:1.

Propagating illicit sexual rapports (*asha'a al-fahishah*): 102/24:19.

Adultery (*zina*): 50/17:32; 102/24:2; 102/24:3; 42/25:68; 91/60:12.

The need for four witnesses: 92/4:15.

The man and the woman are punished with 100 lashes in the presence of a crowd of believers as witnesses: 102/24:2.

The wives of Muhammad have double chastisement and double recompense: 90/33:30-31.

The slaves incur half the chastisement: 92/4:25.

Anal rapports between men and women are forbidden: 87/2:222.

Committing perversity (*fajara*): 38/38:28; 71/71:27; 31/75:5; 24/80:42; 82/82:14; 86/83:7.

Prostitution (*bagha'*): 102/24:33; 44/19:20; 44/19:28.

Seduction (story of Joseph): 53/12:23-32; 53/12:51.

Masturbation, norm deducted from: 74/23:1; 74/23:5-7; 102/24:33.

Concubinage is forbidden

(*sifah*): 92/4:24; 92/4:25; 112/5:5.

(*mukhadanah*): 92/4:25; 112/5:5.

Homosexuality (ata al-rajul, ata al-dhakar)

7:81; 47/26:165; 48/27:55; 85/29:29.

The story of Lot: 39/7:80-84; 52/11:74-83; 52/11:89; 54/15:57-77; 73/21:74; 47/26:160-174; 48/27:54-58; 85/29:28-35; 56/37:133-138; 37/54:33-39.

Lesbians (*fahishah*): if there are four witnesses: confined in the house up to death: 92/4:15.

Homosexuals (*fahishah*): clamp down on them. Should they repent and reform, leave them in peace: 92/4:16.

Defamation (rama al-muhassanat)

The slanderer is to be punished with 80 lashes: 102/24:4.

His witness is to be rejected: 102/24:4.

He is cursed on earth and in the other life: 102/24:23.

Defamation between spouses (*li'an*): in order to escape punishment, the husband must swear that he is saying the truth, and the woman that she is innocent: 102/24:6-9. This is cause for divorce.

Defamation against Ayshah, one of the wives of Muhammad (*hadith al-ifk*): 102/24:11-20.

6) Dress-code

Clothes are for covering nudity: 39/7:26-27.

Clothes are for protecting against heat and violence: 70/16:81.

Being well-dressed for prayer: 39/7:31-32.

Not to undress oneself in front of strangers: 102/24:58-60; 90/33:55.

Veil for the women:

- Pulling down the veil (*khimar*) over the chest in the presence of strangers: 102/24:31.
- Pulling down the big veil (*jilbab*): 90/33:59.
- Asking for one's goods from the women (of Muhammad) behind the veil (*hi-jab*): 90/33:53.
- Old women without the hope of getting married can remove their outdoor clothes (*thiyab*): 102/24:60.

It is forbidden for the women to expose their finery (*tabarraja*): 102/24:60; 90/33:33.

They should not stamp the ground with their feet in order to show the finery that they hide: 102/24:31.

Women must lower their eyes and not to show their finery to strangers: 102/24:31; 90/33:55.

Women should not be indulgent in their language with strangers: 90/33:32.

They must remain at home: 90/33:33.

Eunuchs are accessible to women 102/24:31.

Men should lower their eyes: 102/24:30.

Clothes of paradise: 69/18:31; 103/22:23; 43/35:33; 64/44:53; 98/76:12; 98/76:21.

7) Harm to property

Stealing (saraqa)

5:38; 91/60:12.

Punishment: amputating the hand: 112/5:38.

Repentance (*taba*): 112/5:39.

Illicit devouring of the property of the other (akala al-mal bil-batil)

2:188; 92/4:29; 92/4:161.

The religious devour illicitly the property of the other: 113/9:34.

Devouring (*akala*) the property of the orphans: 92/4:2; 92/4:6; 92/4:10.

Dealing with the property of the orphans in the best manner (*qaraba*): 55/6:152; 50/17:34.

Devouring illicit gains (*akala al-suht*): 112/5:42; 112/5:62; 55/6:63.

Taking by force (*akhadha ghasban*): 69/18:79.

Corruption of judges in order to dispossess the other: 87/2:188.

Impeding women from remarrying in order to inherit from them: 92/4:19.

Devouring the inheritance: 10/89:19.

Alteration (*baddala*) of the testament: 87/2:181-182.

Giving to people what is theirs: 47/26:183.

Respecting the measure and the weight

(*wazana*): 55/6:152; 39/7:85; 52/11:84; 52/11:85; 50/17:35; 47/26:182; 97/55:8; 97/55:9; 86/83:3.

(*kala*): 55/6:152; 39/7:85; 52/11:84; 52/11:85; 53/12:59; 53/12:88; 50/17:35; 47/26:181; 86/83:2; 86/83:3.

Coveting the property or other things

(*hasada*): 87/2:109; 92/4:54; 111/48:15; 20/113:5.

(*madda 'aynahu*) the property of women: 54/15:88; 45/20:131.

(*tamanna*): 92/4:32.

8) Respecting the other

Entering the house without permission: 102/24:27-28; 102/24:58-59.

- if no one is present, one can enter in order to look for one's own property: 102/24:29.

Eating in someone else's house: 102/24:61.

Not to enter during times of meals without invitation: 90/33:53.

- If it is a question of looking for one's property, ask for it from women behind the veil (*hijab*): 90/33:53.

Not eavesdropping: 90/33:53.

Not to raise one's voice in someone's house: 106/49:3.

Not to call out from outside the house, wait for the owner to come out: 106/49:4-5.

Heeding the instructions of the master of the house: sitting or withdrawing: 105/58:11.

Winking (*taghamaza*): 86/83:30.

Being sarcastic (*fakiha*): 86/83:31.

Offending (*adha*) without reason: 90/33:58.

Making fun of others:

- (*sakhara*): 87/2:212; 113/9:79; 52/11:38; 74/23:110; 56/37:12; 56/37:14; 106/49:11.
- (*dahika*): 90/33:110; 86/83:29; 86/83:34.

Criticizing (*lamza*): 113/9:58; 113/9:79; 106/49:11; 32/104:1.

Spying (*tajassasa*): 106/49:12.

Slandering (*hamaza*): 2/68:11; 32/104:1.

Nicknaming (*nabaza*): 106/49:11.

Scandal-mongering (*mashsha' bi-namim*): 2/68:11.

Speculating about others (*dhanna*): 106/49:12.

Speaking about others in their absence (*ighataba*): 106/49:12.

- (*buhtan*): 92/4:156; 102/24:16; 90/33:58; 91/60:12.

Publicly diffusing:

- (*jahara bil-su'*) evil, unless due to injustice incurred: 92/4:148.
- (*asha'a al-fahishah*) wickedness: 102/24:19.
- (*adha'a*) spreading news without verifying it: 92/4:83.

Verifying (*tabayyana*) false news: 106/49:6.

Not to give heed to unverified rumors (*la taqif ma laysa laka bihi 'ilm*): 50/17:36.

Accusing an innocent person of one's own fault (*rama bari'*). 92/4:112.

Secret conspiracy:

- (*bayyata*): 92/4:108.
- (*asarra*): 45/20:60; 73/21:3; 63/43:79-80.
- (*tanaja*): 45/20:60; 73/21:3; 63/43:79-80; 105/58:8-10.

Lying: 103/22:30.

Courtesy: 92/4:86; 50/17:53; 102/24:61; 106/49:1-5.

Cheating (*khada'a*): 87/2:9.

Betraying the other:

- (*khana*): 87/2:187; 92/4:105; 92/4:107; 112/5:13; 88/8:27; 88/8:58; 88/8:71; 53/12:52; 103/22:38; 60/40:19; 107/66:10.

- (*ghalla*): 89/3:161.

Talking and discussing in a friendly manner: 87/2:83; 87/2:263; 92/4:5; 92/4:8; 72/14:24-27; 70/16:125; 50/17:23; 45/20:44; 48/27:28; 85/29:46.

Responding to evil with good: 96/13:22; 74/23:96; 49/28:54; 61/41:34.

Putting up with others with patience: 89/3:186; 45/20:130; 34/50:39; 3/73:10.

Distancing oneself from the ignorant: 39/7:199; 49/28:55.

Not behaving with pride and not raising the voice: 39/7:146; 70/16:23; 50/17:37-38; 42/25:63; 49/28:83; 57/31:18-19.

Not boasting to be pure: 92/4:49; 23/53:32.

Not preaching to others what one does not do: 87/2:44; 109/61:2.

Not to hinder the good (*mana'a al-khayr*): 34/50:25; 2/68:12.

Not to be hard-hearted (*qasa*): 112/5:13; 55/6:43; 103/22:53; 59/39:22.

Not to be trivial (*lagha*): 87/2:225; 112/5:89; 44/19:62; 74/23:3; 42/25:72; 49/28:55; 76/52:23; 46/56:25; 61/41:26; 80/78:35; 68/88:11.

9) Dietary restrictions

Forbidden for the Jews: 55/6:146.

- Things that the Jews forbade for themselves: 89/3:93.

Nothing is forbidden for the pious: 112/5:93.

Not to declare illicit what is licit: 112/5:87; 55/6:140.

Eating and drinking with moderation: 39/7:31.

Permitted food:

- Every licit thing: 87/2:168; 87/2:172; 112/5:88; 70/16:114.

- Every pure thing: 87/2:168.

- Every good thing: 112/5:4; 112/5:5; 112/5:88; 39/7:157; 70/16:114.

- Livestock: 112/5:1; 55/6:142; 70/16:5; 103/22:28; 74/23:21; 60/40:79.

- Game over which the name of God has been pronounced: 112/5:4.

- Except game in the state of sacralisation: 112/5:1-2 and 112/5:94-96.

- Seafood: 43/35:12; 112/5:96.

- Fishing is allowed in the sacred state: 112/5:96.

- The harvest: 55/6:141.

- Food of the People of the Book: 112/5:5.

Forbidden food:

- Bad things: 39/7:157.

- Pork: 87/2:173; 112/5:3; 112/5:60; 55/6:145-146; 70/16:115.

- Blood: 87/2:173; 55/6:145; 112/5:3; 70/16:115.

- Dead bodies (*mayyitah*: dead animals): 87/2:173; 55/6:145; 112/5:3; 70/16:115.

- Horses, asses and donkeys: 70/16:8.

- Animals shared through drawing lots using arrows: 112/5:3.

- Animals sacrificed on erected stones: 112/5:3.

- Animals over which a name is pronounced other than that of God: 112/5:3; 70/16:115.

- Animals sacrificed to other than God: 55/6:145.

- Wine (*khamr*): 87/2:219; 92/4:43; 112/5:90-91; 70/16:67; 95/47:15 (in paradise).

Pronouncing the name of God over food: 112/5:3; 112/5:4; 55/6:118-119; 55/6:121; 70/16:115; 103/22:28; 103/22:34; 103/22:36; 55/6:118-119; 112/5:4; 55/6:121; 70/16:115.

Rejected Arab customs:

- Suppression of some Arab prohibitions: 55/6:138-140; 55/6:143-144.
- Rejection of the Arab custom of freeing animals for the idols: 112/5:103.

Cannibalism (*akala lahm akhi*): 106/49:12.

Exemption in case of necessity: 87/2:173; 112/5:3; 55/6:119; 55/6:145; 70/16:115.

10) Penalties

Avoiding penalties

Do not apply pitilessly: 47/26:130.

Forgiveness of the victim or the legal claimant: 112/5:45; 92/4:92; 87/2:178; 89/3:134; 62/42:40.

Repentance and going back to the right path (*tab wa-aslah*): 87/2:160; 89/3:89; 92/4:16; 112/5:34; 112/5:39; 92/4:146; 112/5:39; 55/6:48; 55/6:54; 39/7:35; 70/16:119; 102/24:5; 70/16:126.

Repentance at the threshold of death is not permitted by God: 92/4:18.

Reconciliation: 62/42:40.

Paying of the blood price (*diyyah*) for unintentional manslaughter: 92/4:92.

Paying of compensation in case of the implementation of the law of retaliation: 87/2:178.

Crucifixion

Crucifixion of Jesus denied: 92/4:157.

For the offence of *harabah* (insurrection, robbery): 112/5:33.

Punishment inflicted by Pharaoh: 39/7:124; 53/12:41; 45/20:71; 47/26:49.

Death penalty

As an implementation of the law of retaliation (*qisas*): 87/2:178; 112/5:32.

For the offence of *harabah* (insurrection, robbery): 112/5:33.

Extermination (*qata'a dabir*): 55/6:45; 39/7:72; 88/8:7; 54/15:66.

The law of retaliation

See above: harm to life and physical integrity.

Amputating the hand and the leg

For the offence of *harabah* (insurrection, robbery): 112/5:33.

Penalty inflicted by Pharaoh: 39/7:124; 45/20:71; 47/26:49.

Amputating the hand for stealing: 112/5:38.

Stoning

Penalty for Sodom: 52/11:82-83; 54/15:74; 48/27:58; 67/51:33.

Penalty for the tribe of Chuaib: 52/11:91.

Penalty for the people of the cave: 69/18:20.

Penalty for the tribe of Abraham: 44/19:46.

Penalty for the tribe of Noah: 47/26:116.

Penalty for the inhabitants of the City: 41/36:18.

Penalty for Pharaoh's people: 64/44:20.

Lashes

For adultery: 102/24:2.

For defamation of adultery: 102/24:4.

Deprivation of the right to give witness

For witnesses of an incorrect testament: 112/5:107-108.

For the slanderer of adultery: 102/24:4.

Liberation of a slave

For unintentional manslaughter: 92/4:92.

For the breach of an oath: 112/5:89.

In the case of comparing the woman with the back of the mother: 105/58:3.

Feeding and dressing the poor

Feeding for not observing Ramadan: 87/2:184.

Feeding for breaching the oath: 112/5:89.

Feeding for hunting in a sacred state: 112/5:95.

Feeding in case of comparing a woman with the back of the mother: 105/58:4.

Dressing the poor for breaching the oath: 112/5:89.

Alms-giving for the inability of shaving the head during the pilgrimage: 87/2:196.

Offering a sacrifice

For the inability of going on pilgrimage: 87/2:196.

For having hunted in the state of sacralisation: 112/5:95.

Fasting as a penalty

For the inability of shaving the head during the pilgrimage: 87/2:196.

In case of unintentional manslaughter: 92/4:92.

For breaching an oath: 112/5:89.

For having killed game in state of sacralisation: 112/5:95.

In the case of comparing a women with the back of the mother: 105/58:3-4.

Other penalties

Beating the wife for bad conduct (*nushuz*): 92/4:34.

Relegating the woman for bad conduct (*nushuz*): 92/4:34.

House confinement up to death for lesbians: 92/4:15.

Not to interact with those who deride religion: 92/4:140.

Banishment for the offence of *harabah* (insurrection, robbery): 112/5:33.

Detaining the criminal as ransom (the story of Joseph): 53/12:75.

God transformed sinners into monkeys and pigs: 87/2:65; 112/5:60; 39/7:166.

IX. Fundamental rights

1) Equality between man and woman

Equality in principle

Man and woman created from the same person: 92/4:1; 55/6:98.

To each one his entitlement: 92/4:32.

They have the same merit and the same chastisement: 89/3:195; 92/4:124;
113/9:67-68; 113/9:71-72; 70/16:97; 90/33:35; 90/33:73; 60/40:40; 95/47:19;
111/48:5-6; 94/57:13; 94/57:18.

Inequality rejected in a pre-Islamic food custom: 55/6:139.

The offence of both is equal: 90/33:58.

God gives boys and girls and renders sterile as he wishes: 62/42:50.

Not to see in the birth of girls a bad omen: 70/16:58-59; 63/43:17-18.

Inequality in rights

Man has predominance: 87/2:228.

Man has authority over the woman because of favours God has conferred upon him and because he provides for the woman: 92/4:34.

Man receives double of what a woman receives in inheritance: 92/4:11-12.

The testimony of a man is twice that of a woman: 87/2:282.

A man can marry up to four wives, but a woman can only marry one husband (see above in rubric VI.2).

A Muslim can marry a non-Muslim monotheist woman, but a Muslim woman can only marry a Muslim man (see above in rubric VI.2).

The woman obeys the man: 92/4:34; 91/60:12.

The man has the right to relegate the wife to the bed and to beat her in case of bad conduct (*nushuz*): 92/4:34.

2) Work and public function of the woman

Arguments of the conservative camp:

- The place of the woman is the house: 39/7:189; 90/33:33; 99/65:1.
- The Koran warned Adam against the temptation of the devil against him and his wife: 45/20:117.
- It is the responsibility of the man to financially provide: 92/4:34.
- The woman should only work if the man does not manage to provide for her (the story of Moses): 49/28:23-24.
- The work of the woman should be done within the limits of the Muslim dress norms and the separation of sex: 53/12:33; 90/33:32-33; 90/33:59.
- The woman needs the authorization of her guardian who has authority over her: 87/2:228; 92/4:34.
- Man is responsible for the wife before God and before society: 107/66:6.
- A woman should not occupy a position of authority over man: 87/2:228; 92/4:34.
- The woman should not envy the man or compete with him in his domain: 92/4:32.
- The woman is incapable of keeping a secret, including in the house of Muhammad: 107/66:3.

Arguments from the progressist camp:

- The Koran admits the equality in principle of man and woman (see above).
- Dress Muslim norms and the separation of sex concern the wives of Muhammad: 53/12:33; 90/33:32-33; 90/33:59.
- The verses 87/2:228 and 92/4:34 concern the relationship between man and woman within the family and not in politics.
- The Koran cites a case of a woman who had power acknowledged by her own people 48/27:32-33.
- The Koran says man and woman enjoin what is good and forbid what is evil 113/9:71.
- A woman pledged allegiance to Muhammad: 91/60:12.

3) Religious freedom

Difference in religion should not become cause for dispute, God will settle the divergences: 87/2:139; 103/22:17; 103/22:67-69; 85/29:46; 62/42:15.

There is no constraint in religion: 87/2:256; 39/7:88; 51/10:99; 52/11:28; 69/18:20; 69/18:29; 34/50:45; 55/6:104; 51/10:41; 51/10:108; 48/27:92; 59/39:41; 3/73:19; 4/74:54-55; 98/76: 29.

Faith comes from God: 55/6:125.

Harm to freedom of religion: 87/2:114.

See also rubric VIII.2

4) People of the Book (*ahl al-kitab*)

The Muslim State accepts on its territory adepts of religious communities with a sacred book, called *ahl al-kitab* (People of the Book: a term used 31 times in the Koran: 87/2:105; 87/2:109; 89/3:64; 89/3:65; 89/3:69; 89/3:70; etc.). They are *dhimmi*s: the protected of the Muslim community with lesser rights. This attitude is explained by the fact that according to the Koran all the prophets and messengers are sent by God, and Muslims must believe them without distinction: 87/2:4-5; 87/2:136; 87/2:177; 87/2:285; 89/3:84; 89/3:179; 92/4:136; 92/4:150-152; 92/4:171; 112/5:59; 85/29:46; 62/42:15; 94/57:19. The communities are:

Jews

2:62; 112/5:69; 103/22:17.

With the polytheists, they are the fiercest enemies of the Muslims: 112/5:82.

Nazarenes

2:62; 112/5:69; 103/22:17.

They are the most disposed to love the Muslims: 112/5:82.

Among them there are priests and monks who are not haughty: 112/5:82.

Sabians

2:62; 112/5:69; 103/22:17.

Magians

103/22:17.

Relations with non-Muslims

Good relations with them if they are not fighting against Islam: 91/60:8-9.

Paying of tribute (*jizyah*): 113/9:29.

Each of these communities keeps its laws and tribunals: 87/2:148; 112/5:42-50; 103/22:67.

Muslims can marry the women of the People of the Book, but the latter cannot marry the women of the Muslims; norm deduced from: 87/2:221; 92/4:141; 112/5:5 and 91/60:10.

Muslims can eat their food: 112/5:5.

People of the book cannot enter into the mosque: 113/9:17 or in the Ka'aba 113/9:28.

Discuss in a friendly manner with them: 70/16:125; 85/29:46.

Avoid associating with them: 89/3:28; 112/5:51; 113/9:8; 113/9:23.

All these communities should one day enter the fold of Islam, the only religion accepted by God: 89/3:19; 89/3:83; 89/3:85; 85/29:49.

Some verses of the Koran precipitated these communities into hell after death if they did not convert: 89/3:85; 100/98:6.

Some verses accuse Jews and Nazarenes of being polytheists: 112/5:72-73 and 113/9:30-31.

Some jurists think that the tolerant verses in their regard have been abrogated by the sword verse: 113/9:5.

5) Apostates (*murtad*)

This involves abandoning Islam. We discussed this in rubric VIII.2.

6) Polytheists (*mushrikun*)

Initially they had the same rights reserved to other communities: 103/22:17.

Withdrawal of the acknowledgement of their three goddesses Lat, Uzza and Manat: 23/53:19-23, and abrogated verses.

Everlasting enmity and hatred in their regard: 91/60:4.

With the Jews, they are the fiercest enemies of the Muslims: 112/5:82.

Polytheism is the greatest unforgivable sin: 92/4:36; 92/4:48; 92/4:116; 112/5:72; 55/6:56; 55/6:151; 39/7:33; 50/17:22; 50/17:39; 69/18:110; 57/31:13; 60/40:66; 66/46:5; 67/51:51; 91/60:12.

Destruction of their idols as did Abraham: 55/6:74; 73/21:52-71; 47/26:70-77; 56/37:85-98.

Denunciation of the pact with the polytheists and declaration of total war against them: 113/9:1-13; 113/9:36.

- Exception made of the neutral, until the end of the pact: 113/9:4.

Distancing oneself from the polytheists: 55/6:106; 54/15:94.

Prohibition of marriage between Muslims and polytheists, deduced from: 87/2:221; 92/4:141; 112/5:5 and 91/60:10.

Prohibition of entering mosques: 113/9:17, or the Ka'aba: 113/9:28.

Prohibition of praying for the dead of the disbelievers, even if they were parents: 113/9:84; 113/9:113.

7) Hypocrites (*munaḥiqun*)

Hypocrites are people who say that they are believers, without being so in reality.

The Koran dedicates chapter 63 (comprising 11 verses) to this category.

The term is found in 27 verses: 89/3:167; 92/4:61; 92/4:88; 92/4:138; 92/4:140; 92/4:142; 92/4:145; 92/4:49; 113/9:64; 113/9:67-68; 113/9:73; 113/9:101; 85/29:11; 90/33:1; 90/33:12; 90/33:24; 90/33:48; 90/33:60; 90/33:73; 111/48:6; 94/57:13; 101/59:11; 104/63:1; 104/63:7-8; 107/66:9.

The Koran uses the term jointly with the terms of disbelievers (*kuffar*: 113/9:68; 113/9:73; 90/33:1; 90/33:48; 101/59:11; 107/66:9) and polytheists (*mushrikun* 90/33:73; 111/48:6).

The Koran uses the term hypocrisy (*nifaq*) in the verses: 113/9:77; 113/9:97; 113/9:101.

They encourage others not to pay and they do not pay: 113/9:67; 113/9:99; 90/33:19; 104/63:7.

They refuse to participate in the fight: 89/3:167; 90/33:12ff; 101/59:11ff.

They have created a rival mosque, in which it is forbidden for Muslims to pray: 113/9:107-110.

War against hypocrites as against disbelievers: 113/9:73; 107/66:9.

They must be killed: 92/4:89; 90/33:61.

They must be expelled: 90/33:60.

They can repent: 92/4:146; 113/9:74; 90/33:24.

8) Disbelievers (*kuffar*)

The Koran dedicates chapter 109 (comprising 6 verses) to this category. The term *kafir* appears in 156 verses of the Koran and the verb from which it derives (*kafara*), in more than 300 verses.

Disbelievers are people who refuse to believe in the mission of Muhammad. Because of this, the term covers People of the Book, apostates, polytheists and hypocrites. By consequence, the status of disbelievers, at least on earth, varies according to the category they belong to.

9) Slaves

What your hand possesses (*ma malakat aymanukum*):

- Treat them with goodness: 92/4:36.
- Not to elevate the slave to equality by paying him the sums ordained by God: 70/16:71; 84/30:28.

Freeing of the slaves (*tahrir raqabah*):

- Out of goodness and pity: 87/2:177; 35/90:13; 113/9:60.
- As expiation for unintentional manslaughter: 92/4:92.
- As expiation for comparing a woman with the back of the mother: 105/58:3.
- As expiation for a breached oath: 112/5:89.
- In writing (*kitab*): 102/24:33.

Legal alms-giving are used for freeing the slaves: 113/9:60.

10) Bedouins (*a'rab*)

The Koran speaks negatively of a group of nomads who used to refuse to fight alongside Muhammad and which it considers as the worst among disbelievers and hypocrites: 113/9:90; 113/9:97-99; 113/9:101; 113/9:120; 90/33:20; 111/48:11-12; 111/48:16; 106/49:14-17.

X. Socio-economic laws

1) State finances

Legal alms-giving (*zakat*): in most of the verses using this term, it is coupled with prayer:

- As a pillar of Islam: 87/2:110; 87/2:177; 87/2:277; 92/4:77; 92/4:162; 112/5:55; 113/9:5; 113/9:11; 113/9:18; 113/9:71; 103/22:41; 103/22:78; 74/23:4; 102/24:37; 102/24:56; 48/27:3; 84/30:39; 57/31:4; 90/33:33; 61/41:7; 105/58:13; 3/73:20; 100/98:5.
- Prescribed for the Jews: 87/2:43; 87/2:83; 112/5:12; 112/5:156; 39/7:156.
- Prescribed for the Nazarenes: 44/19:31.
- Prescribed by Ishmael: 44/19:55.
- Prescribed also for the women: 90/33:33.
- Prescribed by Isaac and Jacob: 73/21:72-73.

Legal alms-giving (*sadaqah*): 87/2:196; 87/2:263; 92/4:114; 113/9:103; 105/58:12.

Harvest tax (*hasad*): 55/6:141.

Property tax: 113/9:103-104.

War booty: 89/3:161; 88/8:1; 88/8:69; 111/48:15; 111/48:19-21.

Beneficiaries of the alms:

- (*sadaqah*): 113/9:60.
- (*nafaqah*): 87/2:215.
- Discontent on their side: 113/9:58.

Beneficiaries of the booty: 101/59:6-10; 88/8:41.

- The rich should not monopolize the booty: 101/59:7.

The duty of accounting for the origin of property to the State: 89/3:37.

2) Solidarity obligation

General obligation to accomplish good

Accomplishing good works (*'amilu al-salihah*): The latter is coupled with belief:

87/2:25; 87/2:82; 87/2:277; 89/3:57; 92/4:57; 92/4: 122; 92/4:173; 112/5:9; 112/5:93; 39/7:42; 51/10:4; 51/10:9; 52/11:23; 96/13:29; 72/14:23; 69/18:30; 69/18:88; 69/18:107; 44/19:60; 44/19:96; 45/20:82; 103/22:14; 103/22:23; 103/22:50; 103/22:56; 102/24:55; 47/26:227; 49/28:69; 49/28:80; 85/29:7; 85/29:9; 85/29:58; 84/30:15; 84/30:45; 57/31:8; 75/32:19; 58/34:4; 58/34:37; 43/35:7; 38/38:23; 38/38:28; 60/40:58; 61/41:8; 62/42:22; 62/42:23; 62/42:26; 65/45:21; 65/45:30; 95/47:2; 95/47:12; 111/48:29; 108/64:9; 99/65:11; 83/84:25; 27/85:11; 28/95:6; 100/98:7; 13/103:3.

Competing in accomplishing good: 87/2:148; 112/5:48.

The obligation to help the other

God provides for the needs of his creation and gives to whom he wills: 87/2:212;

89/3:37; 52/11:6; 50/17:30; 102/24:38; 49/28:82; 85/29:60; 85/29:62; 84/30:37; 58/34:24; 58/34:36; 58/34:39; 43/35:3; 62/42:12; 62/42:19.

He who gives, gives what God gave him: 87/2:3; 87/2:254; 92/4:39; 88/8:3; 96/13:22; 72/14:31; 70/16:75; 103/22:35; 49/28:54; 75/32:16; 43/35:29; 41/36:47; 63/43:38; 94/57:7; 104/63:10.

Be beneficent like God has been with you: 49/28:77.

Giving is borrowing to God and being well compensated in the Hereafter:

87/2:245; 112/5:12; 94/57:11; 94/57:18; 108/64:17; 3/73:20.

He who gives purifies himself: 9/92:18.

He who gives does not perform charity, but he gives to the other his due (*haq*): 50/17:26; 84/30:38.

Piety does not consist in praying in a particular direction, but in believing and giving to the needy: 87/2:177.

Stinginess is condemned:

- (*bakhala*: being stingy): 89/3:180; 92/4:37; 113/9:76; 95/47:37; 95/47:38; 94/57:24; 9/92:8.
- (*amara bil-bukhl*: enjoining stinginess): 92/4:37; 94/57:24.
- (*qatara*): 50/17:100; 42/25:67.
- (*shahha*): 92/4:128; 90/33:19; 101/59:9; 108/64:16.
- (*ghalla yadahu ila 'unqih*): 50/17:29.
- (*qabada yadahu*): 113/9:67.
- (*mana'a*): 79/70:21.
- (*li-hub al-khayr shadid*): 14/100:8.

- (*yamna' al-ma'un*): 17/107:7.

Wastage is condemned:

- (*badhdhara*): 50/17:26-27.

- (*asrafa*): 55/6:141; 42/25:67.

- (*basata yadahu kul al-bast*): 50/17:29.

- (*ahlaka malan lubada*): 35/90:6.

Hoarding money instead of spending it in doing good: 89/3:14; 113/9:34-35; 79/70:18.

Neither stinginess nor wastage, but the right balance: 42/25:67.

Giving secretly and privately: 87/2:271; 87/2:274; 96/13:22; 72/14:31; 70/16:75; 43/35:29.

It is better to give discreetly: 87/2:271.

Not to give in order to be seen: 87/2:264; 92/4:38.

Not to give in order to be praised: 92/4:38.

Not to give in order to receive more: 4/74:6.

Not to repay alms (*sadaqah*) with evil (*adha*): 87/2:262-264.

Giving away the excessive: 87/2:219.

Giving the best: 87/2:267.

Giving from what one loves: 89/3:92.

Giving when one is at ease and in adversity: 89/3:134.

Giving before consulting Muhammad: 105/58:12-13.

Those to be sustained

The close relatives (*dhu al-qurba*): see rubric VI.6.

The poor:

- (*miskin*): 87/2:83; 87/2:177; 87/2:184; 87/2:215; 92/4:8; 92/4:36; 112/5:89; 112/5:95; 88/8:41; 113/9:60; 50/17:26; 102/24:22; 84/30:38; 105/58:4; 101/59:7; 2/68:24; 4/74:44; 98/76:8; 35/90:16.

- Encouraging others to feed them: 78/69:34; 10/89:18; 17/107:3.

- (*faqir*): 87/2:271; 87/2:273; 113/9:60; 103/22:28; 101/59:8.

Immigrants: 102/24:22; 90/33:6; 101/59:8-9.

Those heavily in debt (*gharim*): 113/9:60.

Those whose hearts are to be won (*al-mu'allafah qulubuhum*): 113/9:60.

The distressed traveller (*ibn al-sabil*): 87/2:177; 87/2:215; 92/4:36; 88/8:41; 113/9:60; 50/17:26; 84/30:38; 101/59:7.

Beggars (*sa'il*): 87/2:177; 67/51:19; 79/70:25; 11/93:10.

- (*qani'*): 103/22:36.

The disinherited (*mahrum*): 67/51:19; 79/70:25.

The deprived (*mi'tar*): 103/22:36.

The neighbours (*jar*): 92/4:36.

The orphans (*yatim*): 87/2:83; 87/2:177; 87/2:215; 92/4:8; 92/4:36; 88/8:41; 101/59:7; 98/76:8; 10/89:17; 35/90:15; 11/93:9; 17/107:2.

Feeding the captive: 98/76:8.

Not to despise the blind: 24/80:1-4.

3) Common good

Water belongs to God (therefore to the community): 46/56:68-70.

Sharing of drinking water: 37/54:28.

Minerals: 88/8:1.

Fire and what produces it, wood or petrol, belong to God (therefore to the community): 46/56:71-72.

4) Burial

Washing the dead: 88/8:11.

Shroud, deduced from 31/75:29.

Putting into the tomb: 112/5:31; 33/77:25-26; 24/80:21.

Not praying over a dead disbeliever: 113/9:84.

Not to ask for divine pardon for the disbelievers: 113/9:80; 113/9:113-114; 104/63:6.

5) Environment

Not to spread evil on earth (*fasad fi 'l-ard*): 87/2:11-12; 87/2:27; 87/2:30; 87/2:60; 87/2:205; 112/5:33; 112/5:64; 39/7:56; 39/7:74; 39/7:85; 39/7:127; 52/11:85; 52/11:116; 53/12:73; 96/13:25; 47/26:152; 47/26:183; 48/27:48; 49/28:77; 49/28:83; 85/29:36; 84/30:41; 38/38:28; 60/40:26; 95/47:22; 10/89:12-13.

Spoiling the creation of God: 92/4:119.

6) Transmission of science

Science is given by God: 87/2:31; 87/2:247; 53/12:22; 69/18:65; 73/21:74; 73/21:79-80; 48/27:15; 49/28:14; 97/55:4; 1/96:3-5.

The learned are superior to the ignorant: 55/6:50; 52/11:24; 96/13:16; 43/35:19; 60/40:58; 59/39:9; 105/58:11.

Freely giving knowledge: 55/6:90; 51/10:72; 52/11:29; 52/11:51; 53/12:104; 42/25:57; 47/26:127; 58/34:47; 41/36:21; 38/38:86; 62/42:23.

Not to monopolize knowledge: 89/3:187; 7/81:24.

Not to hide science: 87/2:42; 87/2:146; 87/2:159-160; 87/2:174; 89/3:71; 89/3:187; 92/4:37; 39/7:169.

The learned fear God: 43/35:28.

Not to speak of that of which we have no knowledge: 89/3:66; 50/17:36; 103/22:3; 103/22:8; 102/24:15; 57/31:20.

Seeking science: 89/3:137; 69/18:65-66; 103/22:46; 85/29:20.

Praying for the increase of science: 45/20:114.

The duty of educating oneself in matters of religion: 113/9:122; 70/16:43; 73/21:7.

7) Figurative Art

Sanam: 55/6:74; 39/7:138; 72/14:35; 73/21:57; 47/26:71.

Timthal: 73/21:52; 58/34:13.

Nasab: 112/5:3; 112/5:90; 79/70:43.

Naht: 56/37:95.

Alihah (divinities): 55/6:74; 39/7:138; 50/17:42; 69/18:15; 44/19:81; 73/21:21; 73/21:22; 73/21:24; 73/21:43; 73/21:99; 42/25:3; 42/25:43; 41/36:23; 41/36:74; 56/37:86; 38/38:5; 63/43:45; 66/46:28.

Names of divinities: Al-Lat (23/53:19), Al-'Uzza (23/53:19), Manat (23/53:20), Wadd, Suwa'a, Yagut, Ya'uq and Nasr (71/71:23).

Noah hostile to idols: 71/71:23-27.

Abraham hostile to idols: 55/6:74; 72/14:35-36; 73/21:52-69; 47/26:69-77.

Moses hostile to idols: 39/7:138-139.

Prohibition of statutes and of any images, figurative or not, on the basis of the verse 48/27:60: to create as God creates.

The image (*surah*) is condemned on the basis of the verses indicating God as the one who forms 89/3:6; 101/59:24; 82/82:6-8.

Jinns make statutes for Salomon: 58/34:13.

Jesus fabricated figurines of birds and would breathe life in them: 89/3:49; 112/5:110.

Statutes can be a means of representing history as says the Koran: 84/30:9.

Prohibition of representing God or making heard his voice: nothing resembles him: 62/42:11.

Prohibition of representing the prophets who should remain as models: 53/12:111.

8) Sport

The brothers of Joseph's race: 53/12:16-17.

Sports as a means of preparing for war, therefore obligatory in accordance with the verse 88/8:60.

Sports must respect Koranic dress code and inter-sexual mixing norms (see VIII.6).

Sports must respect the prohibition of nudity: 39/7:26-27.

Sport must not cause damage to oneself: 87/2:195 or to the other: 92/4:29.

Hunting: 112/5:1-2; 112/5:4 and 112/5:94-96, and fishing: 43/35:12 serve to nourish and not for recreation.

Betting in sport is forbidden: 87/2:219; 112/5:90-91.

XI. Procedural law

1) Judgment

Judge with equity: 92/4:58; 112/5:42; 38/38:26; 62/42:15; 112/5:42; 39/7:29; 52/11:119; 70/16:90.

Hatred should not impede justice: 112/5:2; 112/5:8.

Kinship or richness should not impede justice: 92/4:135; 55/6:152.

Judging non-Muslims: 112/5:42.

Not to corrupt the judges: 87/2:188.

Verifying the information: 106/49:6; 106/49:12; 50/17:36.

2) Conditions of the judge

Be a Muslim: 92/4:141.

Be a man: 92/4:34.

Not being perverse (*fasiq*): 106/49:6.

3) Testimony (*shahadah*)

Not to give false witness (*zur*): 103/22:30; 42/25:72.

Oath of the witness: 112/5:107-108.

Witnessing with justice, without favouritism: 92/4:135; 112/5:8; 112/5:106; 55/6:152; 79/70:33.

The sin of hiding testimony: 87/2:140; 87/2:283.

Indirect witnessing (the story of Joseph): 53/12:26-28.

Testimony for a debt: 87/2:282.

Testimony in case of entrusting property to minors: 92/4:6.

Testimony for divorce: 99/65:2.

Testimony concerning sexual offences: 92/4:15; 102/24:4; 102/24:6; 102/24:13.

Testimony against slander in religious matters (story of Abraham): 73/21:61-62.

Testimony concerning compensation sacrifice: 112/5:95.

Testimony for the will: 112/5:106.

Testimony of the non-Muslims: 112/5:106.

Kinship is not an impediment in giving testimony: 92/4:135; 112/5:106.

The testimony must not suffer damage: 87/2:282.

Challenging the witnesses: 112/5:107.

Not to accept the testimony of one who slanders: 102/24:4.

The testimony of two women is equivalent to that of one man: 87/2:282.

4) Oath and confession

Oath of the witness: 112/5:107-108.

Not to swear in the name of God: 87/2:224.

Not to violate the oath: 70/16:91-92; 70/16:94.

Oath to deprive oneself of one's wife: 87/2:226-227.

Oath in case of adultery accusation without witnesses: 102/24:6-9.

Confession (*iqrar*): 87/2:84.

5) Document

Written testimony in the presence of witnesses: 87/2:282.

Notary (scribe): 87/2:282.

6) Arbitration and reconciliation

Arbitration in case of conflict between spouses: 92/4:35.

Reconciliation: 87/2:182; 87/2:224; 92/4:114; 92/4:128-129; 88/8:1; 62/42:40; 106/49:9-10.

7) Market police (*hisbah*)

It is based on the verses which demand to enjoin good and to forbid evil (see VIII.1), notably 89/3:104.

XII. International relations and law of war

1) God is the master of international relations

God gives power to nations and replaces them due to their sins and their rejection of divine law: 55/6:6; 39/7:100; 39/7:129; 39/7:137; 39/7:155; 39/7:173; 52/11:117; 69/18:59; 42/25:36; 47/26:172-174; 49/28:58; 85/29:31-40; 95/47:10; 78/69:5-10; 26/91:14.

Each community has its destiny from which it cannot escape: 39/7:34; 51/10:49; 54/15:5; 50/17:58; 74/23:43.

God gives land to believers: 39/7:128; 72/14:14; 73/21:105; 102/24:55; 90/33:27.

If a Muslim community abandons God and balks to fight, God withdraws power from it and gives it to others: 113/9:39; 52/11:57; 95/47:38; 79/70:40-41.

God gives power to the oppressed: 39/7:137; 88/8:26; 49/28:5.

If God wants to inflict pain on a nation, nothing can stop him: 96/13:11.

2) War willed by God

War is a duty prescribed by God: 87/2:216; 87/2:246; 92/4:77.

God makes use of war to neutralize some by the others and to stop perversion: 87/2:251; 103/22:40.

God alternates victory among the nations in order to test who are believers: 89/3:140.

For believers fight is for God and for disbelievers the fight is for the devil: 92/4:74.

3) Defensive war

Fighting those who fight you and not to aggress: 87/2:190.

Reciprocity in the fight: 87/2:194.

The war of the oppressed against the aggressors: 103/22:39-40; 91/60:9.

Behave with equity towards those who do not fight and do not oppress: 91/60:8.

4) Offensive war

Preventive war against perversion (*fitnah*) considered worse than killing: 87/2:191; 87/2:193; 87/2:217; 92/4:91; 88/8:39; 88/8:73; 113/9:47.

War for the expansion and total victory of Islam: 88/8:39.

Providing support to the Muslims in the enemy camp which is not covered by a treaty: 88/8:72.

5) Cessation of war (*jihad*) and the signing of peace (*silm*)

Not to call for peace when in a stronger position: 95/47:37.

Encouragement to attain peace: 87/2:208.

Ceasing the war:

- When the enemy embraces Islam: 113/9:5; 113/9:11; 111/48:16.
- When he ceases war and wants peace: 87/2:192-193; 88/8:38-39; 88/8:61.
- When he joins a group with which there is a pact: 92/4:90.
- When he adopts a neutral attitude and asks for peace: 92/4:90-91; 113/9:4.
- When he accepts to submit himself and to pay tribute (*jizyah*) being one of the People of the Book (*ahl kitab*): 113/9:29.

Not to fight near the sacred mosque except if attacked: 87/2:191; 49/28:57; 85/29:67.

Not to fight during the four sacred months: 87/2:217; 112/5:2; 112/5:97; 113/9:2; 113/9:5; 113/9:36-37; 112/5:97.

- Except if attacked: 87/2:194; 87/2:217.

Not to refuse peace with the converted in order to take advantage of the booty: 92/4:94.

Excellence of the fighters over the non-fighters: 89/3:142; 92/4:95; 113/9:20; 106/49:15; 109/61:11.

Suicidal fighters praised: 87/2:207.

Fate of the martyrs:

- They are alive: 87/2:154; 89/3:157; 89/3:169-171.
- Recompense and pardon by God: 89/3:195; 103/22:58-59; 95/47:4.
- The houris: 64/44:54; 76/52:20; 97/55:72; 46/56:22.

6) Desertion and refusal to fight

Not to turn one's back on the enemy: 88/8:15-16.

Not to run away from the fight: 90/33:13.

The number of fighters from which one should not run away: 88/8:65-66.

Running away from the fight does not save one from death: 89/3:145; 89/3:154; 89/3:168; 90/33:16-17.

Those who refuse to fight without a valid reason: 113/9:43; 113/9:45; 113/9:49; 113/9:83; 113/9:86; 113/9:90-98; 111/48:11-16.

The undecided (*mudhabdhabun*) during war: 92/4:141-143.

7) Exemption from war

The blind: 92/4:95; 111/48:17.

The lame: 92/4:95; 111/48:17.

The sick: 92/4:95; 92/4:102; 111/48:17; 113/9:91.

The weak: 113/9:91.

Those who cannot contribute: 113/9:91.

Those without transport: 113/9:92.

The one who teaches religion: 113/9:122.

In case of rain: 92/4:102.

8) Procedure of the fight

Employing all the means: 88/8:60.

Fighting using money and personal involvement: 92/4:95; 88/8:72; 113/9:21; 113/9:41; 113/9:81; 113/9:88; 106/49:15; 109/61:11.

Fighting against the disbelievers and the hypocrites and being harsh against them: 113/9:73; 107/66:9.

Fighting vigorously against the infidels: 42/25:52.

Being brave and not to weaken: 92/4:104.

Not to attack the enemy if the believers in their camp risk suffering: 111/48:25.

Before attacking, be sure of the identity of the other camp: 92/4:94.

Fighting all the disbelievers, as they fight all the Muslims: 113/9:36.

Reinforcement of the angels during war: 89/3:124-125; 88/8:9; 88/8:12; 113/9:25; 113/9:40; 90/33:9-10.

Chastisement during the fight: 88/8:12; 88/8:50.

Eviction from the houses: 87/2:84-85; 87/2:191; 87/2:217; 87/2:286; 89/3:195; 39/7:82; 39/7:88; 39/7:110; 72/14:13; 50/17:103; 103/22:40; 47/26:35; 47/26:167; 48/27:37; 48/27:56; 95/47:13; 101/59:2; 101/59:8; 91/60:1; 91/60:9.

Destruction of places of cult: 87/2:114; 50/17:7; 103/22:40.

Shortening prayer during war: 92/4:101-103.

Not to reproach oneself for the death of an enemy; it is God who kills him: 88/8:17.

Palms cut or left standing with the permission of God: 101/59:5.

God gives victory to whomsoever he wishes: 89/3:13; 89/3:126; 89/3:160; 88/8:10; 84/30:5.

9) Alliance

Alliance with believers: 112/5:55-56; 113/9:71.

Disbelievers associate with one another: 88/8:73; 65/45:19.

Alliance forbidden with:

- Believers who do not emigrate: 88/8:72.
- Polytheists: 89/3:118; 92/4:89; 92/4:139; 92/4:144; 88/8:72; 113/9:7; 105/58:22; 91/60:1; 91/60:13.
- Except in order to be protected against them: 89/3:28.
- Jews and Nazarenes: 112/5:51.
- Disbelieving parents: 113/9:23; 105/58:22.

- The hypocrites: 92/4:88-89; 92/4:139; 92/4:144.

- Those who scorn the word of God: 112/5:57-58.

- Those who fight Islam and evict Muslims from their homes: 91/60:9.

Breaching of the pact concluded with the polytheists: 88/8:58; 113/9:1; 113/9:7-12.

Breaching of the pact in case of treason: 88/8:56-58; 113/9:12-13.

Respecting the pact up to the end with the polytheists who keep their word and do not help others to attack the Muslims: 113/9:4.

10) Captives and ransom (*asir*; *fidyah*)

Taking as captive: 90/33:26.

Killing the enemy before victory, no captives and no ransom: 88/8:67-68.

Chaining the enemy after victory: 95/47:4.

Free liberation (*man*) or against a ransom (*fida'*) after the end of the war: 95/47:4.

Being friendly with the captives: 88/8:70.

Offering food to the captives: 98/76:8.

Legal alms serve to free the captives: 113/9:60.

Prohibition of taking believers as captives in order to ask for ransom: 87/2:85.

11) Immunity

Not to fight near the sacred mosque except when attacked: 87/2:191; 49/28:57; 85/29:67.

Not to fight during the four sacred months: 87/2:217; 112/5:2; 112/5:97; 113/9:2; 113/9:5 (verse of the sword); 113/9:36-37; 112/5:97.

- Except when attacked: 87/2:194; 87/2:217.

Treat with equity the non-belligerent disbelievers: 91/60:8.

Safe-conduct (*aman*) for the polytheists wanting to hear the word of God: 113/9:6.

12) War booty (*anfal*, *ghana'im*, *fay'*)

Booty is licit: 88/8:69.

Not to refuse making peace with the converts in order to take advantage of booties: 92/4:94.

Not to betray trust (*ghalla*) in the sharing of the booty: 89/3:161.

Booty belongs to God and to his Prophet: 88/8:1.

Share the booty with the different categories: 88/8:41; 101/59:6-10.

No booty for those who refuse to participate in war: 111/48:15-21.

13) Immigration towards the abode of Islam

Immigrating: 92/4:100; 113/9:100; 113/9:117; 70/16:41; 102/24:22; 85/29:26; 90/33:50; 101/59:8.

Immigrating and fighting: 87/2:218; 89/3:195; 88/8:72; 88/8:74-75; 113/9:20; 70/16:110; 103/22:58.

Non alliance with believers who do not emigrate: 92/4:89; 88/8:72.

Supporting the immigrants: 102/24:22; 101/59:8-9.

No succession for the immigrants: 88/8:75; 90/33:6.

Emigrating from the Abode of disbelief in order to escape persecution: 92/4:97.

Exempt from the duty of immigration are incapacitated men, women and children: 92/4:98-99.

Asylum for the Muslim wives of the disbelievers: 91/60:10.

The wife of the Muslim escaping from the disbelievers: 91/60:11.

Those who come to the aid of the immigrants (*ansar*):

- Are allies of the immigrants: 88/8:72.
- The immigrants and those who welcome them are approved by God: 113/9:100.
- The immigrants and those who welcome them are forgiven by God: 113/9:117.
- The immigrants and those who welcome them have the right to the war booty: 101/59:8-9.

Bibliography

We shall start with primary sources on the principles of law (*usul al-shari'ah* or *usul al-fiqh*), followed by other works quoted in the book. These works are not generally quoted in the footnotes. We shall indicate as much as possible the date of the death of the authors, according to the Christian era, so that the reader can situate them in time.

For the transliteration, see the general observations, at the beginning of the book. Contrary to the initial 'ayn ('), the definite article (*al-*) is taken into account in the alphabetical order.

I. Contemporary primary sources on the principles of law

- Abu-Naji, 'Abd-al-Salam Mahmud: *Usul al-fiqh*, Dar Awaya, Tripoli (Libya), 2002.
- Abu-Zahrah, Muhammad (d. 1974): *Tarikh al-madhahib al-islamiyyah*, Dar al-fikr al-'arabi, Cairo, s.d.
- Abu-Zahrah, Muhammad (d. 1974): *Usul al-fiqh al-islami*, Dar al-fikr al-'arabi, Cairo, s.d.
- Al-Ashqar, 'Umar Sulayman 'Abd-Allah: *Nadharat fi usul al-fiqh*, Dar al-nafa'is, Amman, 1999.
- Al-Birri, Zakariyya: *Usul al-fiqh al-islami*, Dar al-nahdah al-'arabiyyah, Cairo, 1980.
- Al-Buti, Muhammad Sa'id Ramadan: *Usul al-fiqh, mabahith al-kitab wal-sunnah*, Matba'at Tarabin, Damascus, 1979-80.
- Al-Darini, Fathi: *Usul al-tashri' al-islami wa-manahij al-ijtihad bil-ra'y*, Matba'at dar al-kitab, Damascus, 1976-77.
- Al-Dawalibi, Muhammad Ma'ruf: *Al-madkhal ila 'ulum usul al-fiqh*, Dar Al-Shawwah, Riyadh, 6th edition, 1995.
- Al-Hakim, Muhammad Taqi-al-Din: *Al-usul al-'ammah lil-fiqh al-muqaran*, Al-majma' al-'ilmi li-ahl al-bayt, Qum, 1997.
- Al-Jalidi, Sa'id Muhammad: *Al-madkhal li-dirasat al-fiqh al-islami*, Al-sharikah al-'ammah lil-waraq wal-tiba'ah, s.l., 1998.
- Al-Jidi, 'Umar: *Al-Tashri' al-islami, usuluh wa-maqasiduh*, Manshurat 'Aqqadh, Casablanca, 1987.
- Al-Khudari, Muhammad (d. 1927): *Usul al-fiqh*, Al-maktabah al-tijariyyah al-kubra, Cairo, 6th edition, 1969.
- Al-Qattan, Manna': *Tarikh al-tashri' al-islami*, Maktabat Wahbah, Cairo, 4th edition, 1989.
- Al-Sayyid, Al-Tayyib Khudari: *Buhuth fil-ijtihad fima la nas fih*, Dar al-tiba'ah al-muhammadiyah, Cairo, 1978-79.
- Al-Tantawi, Mahmud Muhammad: *Usul al-fiqh al-islami*, Kulliyyat shurtat Dubai, Dubai, 1990.
- Al-Wazir, Ahmad Muhammad 'Ali: *Al-mustafa fi usul al-fiqh*, Dar al-fikr al-mu'asir, Beirut, 1996.

- Al-Zalmi, Mustafa Ibrahim: *Usul al-fiqh al-islami fi nasijih al-jadid*, Kulliyat Saddam lil-huquq, Bagdad, 1991.
- Al-Zuhayli, Wahbah: *Al-wasit fil-fiqh al-islami*, Jami'at Dimashq, Damascus, 6th edition, 1996.
- Al-Zuhayli, Wahbah: *Usul al-fiqh al-islami*, Dar al-fikr, Damascus, 1986.
- Badran, Badran Abu-al-'Aynayn: *Usul al-fiqh al-islami*, Mu'assasat shabab al-jami'ah, Alexandria, 1979.
- Hallaf, 'Abd Al-Wahhab (d. 1956): *Les fondements du droit musulman*, trans. Claude Dabbak, Asma Godin and Mehrezia Labidi Maiza, Edition Al-Qalam, Paris, 1997.
- Hasab-Allah, 'Ali: *Usul al-tashri' al-islami*, Dar al-ma'arif, Cairo, 1985.
- Hito, Muhammad Hasan: *Al-wajiz fi usul al-tashri' al-islami*, Mu'assasat al-risalah, Beirut, 2nd edition, 1984.
- Husayn, Ahmad Farraj; Al-Sariti, 'Abd-al-Wadud Muhammad: *Usul al-fiqh al-islam*, Mu'assasat al-thaqafah al-jami'iyyah, Alexandria, 1990.
- Ibrahim, Ibrahim 'Abd-al-Rahman: *'Ilm usul al-fiqh al-islami*, Dar al-thaqafah, Amman, 1999.
- 'Id, Khalid 'Abd-Allah: *Mabadi' al-tashri' al-islami*, Sharikat al-hilal, Rabat, 1986.
- Imam, Muhammad Kamal-al-Din: *Nadhariyyat al-fiqh fil-islam*, Al-mu'assasah al-jami'iyyah, Beirut, 1998.
- Isma'il, 'Abd-al-Hamid Abu-al-Makarim: *Al-adillah al-mukhtalaf fiha wa-atharuha fil-fiqh al-islami*, Dar al-muslim, Cairo, 1983.
- Khallaf, 'Abd-al-Wahhab (d. 1956): *'Ilm usul al-fiqh*, Dar al-qalam, Kuwait, 17th edition, 1988.
- Khallaf, 'Abd-al-Wahhab (d. 1956): *Masadir al-tashri' al-islami fima la nas fih*, Dar al-qalam, Kuwait, 5th edition, 1982.
- Madkur, Muhammad Salam: *Manahij al-ijtihad fil-islam*, Matbu'at jami'at al-Kuwayt, Kuwait, reprint, 1977.
- Madkur, Muhammad Salam: *Usul al-fiqh al-islami*, Dar al-nahdah al-'arabiyyah, Cairo, 1976.
- Mahjubi, Muhammad: *Madkhal li-dirasat al-fiqh al-islami*, Dar al-salam, Rabat, 2nd edition, 1999.
- Matlub, 'Abd-al-Majid Mahmud: *Usul al-fiqh al-islami*, Dar al-nahdah al-'arabiyyah, Cairo, 2nd edition, 1992.
- Mu'awwad, 'Ali Muhammad; Al-Mawjud, 'Adil Ahmad 'Abd: *Tarikh al-tashri' al-islami, dirasah fil-tashri' wa-tatawwurih wa-rijalih*, Dar al-kutub al-'ilmiyyah, Beirut, 2000.
- Musa, Muhammad Yusuf: *Al-madkhal li-dirasat al-fiqh al-islami*, Dar al-fikr, Cairo, 1961.
- Musa, Musa 'Abd-al-'Aziz: *Usul al-fiqh al-islami*, Jami'at San'a', Sana'a, 1986.
- Qasim, Yusuf: *Mabadi' al-fiqh al-islami*, Dar al-nahdah al-'arabiyyah, Cairo, 1983.
- Riyadh, Muhammad: *Al-shari'ah al-islamiyyah kamal fil-din wa-tamam lil-ni'mah*, Matba'at al-najah, Casablanca, 2000.
- Sarraj, Muhammad: *Usul al-fiqh al-islami*, Mansha'at al-ma'arif, Alexandria, 1998.

- Sayf, Muhammad Sinan: *Usul al-fiqh al-islami*, Maktabat al-jil al-jadid, Sana'a, 1997.
- Shab'an, Zaki-al-Din: *Usul al-fiqh al-islami*, Manshurat jami'at Qaryunis, Benghazi, 4th edition, 1979.
- Shalabi, Muhammad Mustafa: *Usul al-fiqh al-islami*, Al-Dar al-jami'iyyah, Beirut, 4th edition, 1983.
- Zaydan, 'Abd-al-Karim: *Al-madkhal li-dirasat al-shari'ah al-islamiyyah*, Dar 'Umar Ibn-al-Khattab, Alexandria, 1969.
- Zaydan, 'Abd-al-Karim: *Al-wajiz fi usul al-fiqh*, Maktabat al-Quds, Mu'assasat al-risalah, Bagdad, Beirut, 6th edition, 1985.
- II. Other works**
- 'Abd-al-'Aziz, Zaynab: *Tarjamat al-Qur'an ila ayn? Wajhan li-Jacques Berque*, Al-Nahar, Cairo, 3rd edition, 2001.
- 'Abd-al-Bir, Muhammad Zaki: *Taqnin usul al-fiqh*, Maktabat dar al-turath, Cairo, 1989.
- 'Abd-al-Karim, Fathi: *Al-dawlah wal-siyadah fil-fiqh al-islami*, Maktabat Wahbah, Cairo, 1977.
- 'Abd-al-Nadhir, Muhsin: *Mas'alat al-imamah wal-wad' fil-hadith 'ind al-firaq al-islamiyyah*, Al-dar al-'arabiyyah lil-kitab, Tripoli and Tunis, 1983.
- 'Abd-al-Qadir Al-Jaza'iri, Muhammad (d. 1883): *Tuhfat al-za'irin fi tarikh al-Jaza'ir wal-Amir 'Abd-al-Qadir*, Dar al-yaqdhah al-'arabiyyah, Beirut, 1964.
- 'Abd-al-Rahim, Muhammad Kamil: *Al-tartib al-mawdu'i li-ayat al-Qur'an al-karim*, 'Alam al-kutub, Cairo, 1977.
- 'Abd-al-Rahman, Jalal-al-Din: *Al-masalih al-mursalah wa-makanatuha fil-tashri'*, Dar al-kitab al-jami'i, Cairo, 1983.
- 'Abduh, Muhammad (d. 1905): *Tafsir al-manar*, Dar al-ma'rifah, Beirut, 1980.
- Abou Yousof Ya'koub (d. 798): *Le Livre de l'impôt foncier (kitab al-kharadj)*, trans. and annotated by E. Fagnan, Librairie orientaliste Paul Geuthner, Paris, 1921.
- Abu-Da'ud (d. 888): *Sunan Abu-Da'ud*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Abu-Isma'il, Salah: *Al-shahadah*, Dar al-i'tisam, Cairo, 2nd edition, 1984.
- Abu-'Iz-al-Din, Najla: *Al-duruz fil-tarikh*, Dar al-'ilm lil-malayin, Beirut, 1985.
- Abu-Jayb, Sa'di: *Mawsu'at al-ijma' fil-fiqh al-islami*, Dar al-fikr, Damascus, 2nd edition, 1984.
- Abu-Khzam, Anwar Fu'ad: *Islam al-muwahhidin: al-madhab al-durzi fi waqi'ih al-islami wal-falsafi wal-tashri'i*, Dar al-yamamah, Beirut, 1995.
- Abu-Sa'd, Muhammad Shita: *Al-ijma' 'ind a'immat al-sunnah al-arba'ah*, Dar al-nahdah al-'arabiyyah, Cairo, 1993.
- Abu-Shahbah, Muhammad: *Al-madkhal li-dirasat al-Qur'an al-karim*, Dar al-jil, Beirut, new edition, 1992.
- Abu-Shahbah, Muhammad: *Difa' 'an al-sunnah wa-rad shubah al-mustashriqin wal-kuttab al-mu'asirin*, Majma' al-buhuth al-islamiyyah, Al-Azhar, Cairo, 1985.
- Abu-Turabi, Jamil: *Man hum al-muwahhidun al-duruz*, Dar 'Ala-al-Din, Damascus, 1998.

- Abu-Zahrah, Muhammad (d. 1974): *Al-'ilaqat al-duwaliyyah fil-islam*, Dar al-fikr al-'arabi, Cairo, s.d.
- Abu-Zahrah, Muhammad (d. 1974): *Al-imam Al-Sadiq, hayatuh wa-'asruh, ara'uh wa-fiqhuh*, Dar al-fikr al-'arabi, Cairo, s.d.
- Ahmad Ibn-Hanbal (d. 855): *Musnad Ahmad*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Ahmad, Hamad Ahmad: *Nahwa qanun muwahhad lil-jiyush al-islamiyyah*, Maktabat al-Malik Faysal al-islamiyyah, s.l., 1988.
- Al-Abyari, Ibrahim: *Al-mawsu'ah al-qur'aniyyah*, Mu'assasat sijil al-'arab, s.l., 1984.
- Al-Ahadith al-qudsiyyah*, Al-Majlis al-a'la lil-shu'un al-islamiyyah, Cairo, 6th edition, 1986.
- Al-Ahdal, Hasan Muhammad Maqbuli: *Mustalah al-hadith wa-rijaluh*, Maktabat al-jil al-jadid, Sana'a, 1989.
- Al-'Alawani, Taha Jabir Fayyad: *Adab al-ikhtilaf fil-islam*, Al-ma'had al-'alami lil-fikr al-islami, Herndon, 1992.
- Al-'Amili, Muhammad (d. 1692): *Wasa'il al-shi'ah ila tahsil masa'il al-shari'ah*, Al-maktabah al-islamiyyah, Teheran, 1982.
- Al-'Amri, Nadya Sharif: *Al-naskh fi dirasat al-usuliyyin*, Mu'assasat al-risalah, Beirut, 1985.
- Al-Ansari, Murtada (d. 1864): *Al-taqiyyah*, Dar al-Hadi, Beirut, 1992.
- Al-'Aris, 'Abd-Allah Mustafa: *Al-adillah al-mutam'inah 'ala thubut al-naskh fil-kitab wal-Sunnah*, Maktabat al-hayat, Beirut, 1980.
- Al-'Ashmawi, Muhammad Sa'id: *Al-islam al-siyasi*, Sina lil-nashr, Cairo, 1987.
- Al-'Ashmawi, Muhammad Sa'id: *Al-riba wal-fa'idah fil-islam*, Sina lil-nashr, Cairo, 1988.
- Al-'Ashmawi, Muhammad Sa'id: *Al-shari'ah al-islamiyyah wal-qanun al-masri*, dirasah muqaranah, Maktabat Madbuli, Cairo, 1986.
- Al-'Ashmawi, Muhammad Sa'id: *Usul al-shari'ah*, Sina lil-nashr, Cairo, 3rd edition, 1992.
- Al-Ashmawy, Muhammad Sa'id: *L'islamisme contre l'islam*, trans. Richard Jacquemond in collaboration with Iman Farag and Raphael Costi, Editions la découverte, Paris and Editions al-fikr, Cairo, 1989.
- Al-'Ayli, 'Abd-al-Hakim Hasan: *Al-hurriyyat al-'ammah*, Dar al-fikr al-'arabi, Cairo, 1974.
- Al-Bahnasawi, Salim: *Al-islam la al-'ilmaniyyah, munadharah ma' Fu'ad Zakariyya*, Dar al-da'wah, Kuwait, 1992.
- Al-Bahnasawi, Salim: *Al-Sunnah al-muftara 'alayha*, Dar al-buhuth al-'ilmiyyah, Kuwait, 2nd edition, 1981.
- Al-Bandari, Muhammad: *Al-tashayyu' bayn mafhum al-a'immah wal-mafhum al-farisi*, Dar 'Ammar, Amman, 3rd edition, 1999.
- Al-Bukhari (d. 870): *Sahih Al-Bukhari*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Al-Bundaq, Muhammad Salih: *Al-mustashriqun wa-tarjamat al-Qur'an al-karim*, Dar al-afaq al-jadidah, Beirut, 2nd edition, 1983.

- Al-Buti, Muhammad Sa'id: *Dawabit al-maslahah fil-shari'ah al-islamiyyah*, Mu'asasat al-risalah, Beirut, 4th edition, 1982.
- Aldeeb Abu-Sahlieh, Sami Awad: *Circoncision masculine, circoncision féminine, débat religieux, médical, social et juridique*, L'Harmattan, Paris, 2001.
- Aldeeb Abu-Sahlieh, Sami Awad: *Droit familial des pays arabes, statut personnel et fondamentalisme musulman*, in *Praxis juridique et religion*, 5.1.1988, p. 3-42.
- Aldeeb Abu-Sahlieh, Sami Awad: *Étude sur le droit pénal musulman*, polycopy, Swiss institute of comparative law, Lausanne, 1985.
- Aldeeb Abu-Sahlieh, Sami Awad: *Le secret entre droit et religion: La dissimulation (taqiyyah) chez les chi'ites et les druzes*, in *Les secrets et le droit*, Schulthess, Zurich, 2004, p. 27-60.
- Aldeeb Abu-Sahlieh, Sami Awad: *L'enseignement religieux en Égypte: Statut juridique et pratique*, in *Praxis juridique et religion*, 6.1.1989, p. 10-41.
- Aldeeb Abu-Sahlieh, Sami Awad: *Les interdits alimentaires chez les juifs, les chrétiens et les musulmans*, in <http://groups.yahoo.com/group/sami/>.
- Aldeeb Abu-Sahlieh, Sami Awad: *Les musulmans en Occident entre droits et devoirs*, L'Harmattan, Paris, 2001.
- Aldeeb Abu-Sahlieh, Sami Awad: *Les musulmans face aux droits de l'homme: religion, droit et politique, étude et documents*, Winkler, Bochum, 1994.
- Aldeeb Abu-Sahlieh, Sami Awad: *Liberté religieuse et apostasie dans l'islam*, in *Praxis juridique et religion*, 3.1.1986, p. 43-76.
- Aldeeb Abu-Sahlieh, Sami Awad: *L'impact de la religion sur l'ordre juridique, cas de l'Égypte, non-musulmans en pays d'islam*, University Editions, Fribourg, 1979.
- Aldeeb Abu-Sahlieh, Sami Awad: *L'institution du mufti et de sa fatwa/décision en islam*, in *Praxis juridique et religion*, 7.2.1990, p. 125-148.
- Aldeeb Abu-Sahlieh, Sami Awad: *Projets de constitutions et droits de l'homme islamiques*, Editions de Paris, Paris, 2008.
- Al-Dhahabi, Muhammad Husayn: *Al-Tafsir wal-mufasssirun*, Maktabat Wahbah, Cairo, 1985.
- Al-Dib, Muhammad 'Abd-al-Rahim: *Al-hiyal fil-qanun al-madani, dirasah muqaranah bil-fiqh al-islami*, Dar al-jami'ah al-jadidah, Alexandria, 1997.
- Al-Fadli, 'Abd-al-Hadi: *Al-madhhab al-imami*, in *Al-madhhab al-islamiyyah al-khamsah, tarikh wa-tawthiq*, Al-Ghadi, Beirut, 1998, p. 7-191.
- Al-Farfur, Muhammad 'Abd-al-Latif Salih: *Nadhariyyat al-istihsan fil-tashri' al-islami wa-silatuha bil-masalih al-mursalah*, Dar Dimashq, Damascus, 1987.
- Al-fatawa al-hindiyyah* (1664-1672), Dar ihya' al-turath al-'arabi, Beirut, 3rd edition, 1980.
- Al-fatawa al-islamiyyah min dar al-ifta' al-masriyyah*, Wazarat al-awqaf, Cairo.
- Al-Ghazali, Abu-Hamid (d. 1111): *Fada'ih al-batiniyyah*, Al-Dar al-qawmiyyah, Cairo, 1964.
- Al-Ghazali, Abu-Hamid (d. 1111): *Ihya' 'ulum al-din*, Dar al-ma'rifah, Beirut, 1976.

- Al-Haddad, Yusuf Durrah (d. 1979): *Durus qur'aniyyah, vol. 2: Al-Qur'an wal-Kitab, tome 2: Atwar al-da'awah al-qur'aniyyah*, Al-maktabah al-bulusiyyah, Beirut, 2nd edition, 1986.
- Al-Haddad, Yusuf Durrah (d. 1979): *Durus qur'aniyyah: Bay'at al-Qur'an al-kitabiyyah*, Al-maktabah al-bulusiyyah, Beirut, 2nd edition, 1982.
- Al-Haddad, Yusuf Durrah (d. 1979): *Durus qur'aniyyah: Mu'jizat al-Qur'an*, in <http://www.muhammadanism.org/haddad/quran/p000.htm>.
- Al-Hafni, 'Abd-al-Mun'im: *Mawsu'at al-Qur'an al-'adhim*, Madbuli, Cairo, 2004.
- Al-Hamawi, Usamah: *Al-madhhab al-hanbali*, in *Al-madhahib al-islamiyyah al-khamsah, tarikh wa-tawthiq*, Al-Ghadir, Beirut, 1998, p. 563-619.
- Al-Hariri, Abu-Musa: *'Alam al-mu'jizat*, bahth fi tarikh al-Qur'an, Diyar 'Aql, 1986.
- Al-Haythami: *Kashf al-astar 'an zawa'id musnad Al-Bazzar 'ala al-kutub al-sittah*, Mu'assasat al-risalah, Beirut, 2nd edition, 1404 h.
- Al-Huwaydi, Fihmi: *Iran min al-dakhil*, Markaz al-Ahram, Cairo, 1991.
- 'Ali, 'Abd-al-Jalil Muhammad: *Mabda' al-mashru'iyyah fil-nidham al-islami wal-andhimah al-qanuniyyah al-mu'asirah*, 'Alam al-kutub, Cairo, 1984.
- Al-Imadi, Hamid Ibn-'Ali: *Salah al-'alam bi-ifta' al-'alim*, Amman, Dar 'Ammar, 1988.
- Al-Jabri, 'Abd-al-Mit'al Muhammad: *Al-nasikh wal-mansukh bayn al-thabat wal-nafi*, Maktabat Wahbah, Cairo, 2nd edition, 1987.
- Al-Jahidh (d. 868): *Kitab al-taj fi akhlaq al-muluk*, Al-sharikah al-lubnaniyyah lil-kitab, Beirut, 1970.
- Al-Jamili, 'Abd-Allah: *Badhl al-majhud fi ithbat mushabahat al-rafidah lil-yahud*, Maktabat al-ghuraba al-athariyyah, Medina, 1414 h.
- Al-Jassas (d. 981): *Ahkam al-Qur'an*, Dar al-kitab al-'arabi, Beirut, reprint of the 1325 h edition.
- Al-Jassas (d. 981): *Al-ijma', dirasah fi fikratih min khilal tahqiq bab al-ijma'*, tahqiq wa-dirasah Zuhayr Shafiq Kabbi, Dar al-muntakhab al-'arabi, Beirut, 1993.
- Al-Jassas (d. 981): *Kitab al-hiyal wal-maharij*, edited with the introduction and translation in German by Joseph Schacht under the title: *Das Kitab al-hiial ual-maharig des Abu Bakr Ahmad ibn 'Umar ibn Muhair as-Saibani al-Hassaf*, Orient-Buchhandlung Heinz Lafaire, Hannover, 1923.
- Al-Jaza'iri, Abu-Bakr Jabir: *I'lam al-anam bi-hukm al-hijrah fil-islam, Rasa'il Al-Jaza'iri*, Maktabat Linah, Damanhur, 3rd edition, 1995, p. 711-729.
- Al-Jaza'iri, Muhammad 'Abd-al-Karim: *Muqaddimah fi 'ulum al-Qur'an wa-'ulum al-tafsir*, Jam'iyyat al-da'wah al-islamiyyah, Tripoli (Libya), 2002.
- Al-Jaza'iri, Muhammad Ibn 'Abd-al-Karim: *Tabdil al-jinsiyyah riddah wa-khiyanah*, s.m., s.l., 2nd edition, 1993.
- Al-Jaza'iri, Muhammad Sakhal: *Al-madhhab al-maliki*, in *Al-madhahib al-islamiyyah al-khamsah, tarikh wa-tawthiq*, Al-Ghadir, Beirut, 1998, p. 369-486.
- Al-Jazari, Ibn-al-Razzaz (d. 1205): *Kitab fi ma'rifat al-hiyal al-handasiyyah*, English trans. by Donald R. Hill: *The book of knowledge of ingenious mechanical devices*, D. Reidel, Dordrecht, 1974.

- Al-Jurjani (d. 1413): *Al-ta'rifat*, Dar al-kitab al-masri, Cairo and Dar al-kitab al-lubnani, Beirut, 1990.
- Al-Khaldi, Mahmud: *Naqd al-nidham al-dimuqrati*, Dar al-Jalil and Maktabat al-Muhtasib, Beirut and Amman, 1984.
- Al-Khatib, Ahmad Ibn-'Ali Ibn-Thabit: *Kitab al-faqih wal-mutafaqqih*, Dar al-kutub al-'ilmiyyah, Beirut, 2nd edition, 1980.
- Al-Khatib, Muhammad Ahmad: *Al-harakat al-batiniyyah fil-'alam al-islami: 'aqa'iduha wa-hukm al-islam fiha*, Maktabat al-Aqsa, Amman, 1984.
- Al-Khatib, Muhammad Ahmad: *'Aqidat al-duruz: 'ard wa-naqd*, Dar 'alam al-kutub, Riyadh, 3rd edition, 1989.
- Al-Khatib, Muhammad 'Ajjaj: *Al-wajiz fi 'ulum al-hadith wa-nususih*, Al-matba'at al-jadidah, Damascus, 1978-79.
- Al-Khayyat, 'Abd-al-'Aziz: *Nadhariyyat al-'urf*, Maktabat al-Aqsa, Amman, 1977.
- Al-Khudari, Muhammad (d. 1927): *Tarikh al-tashri' al-islami*, Al-matba'ah al-tijariyyah al-kubra, Cairo, 8th edition, 1967.
- Al-Khumeini (d. 1989): *Al-hukumah al-islamiyyah*, Dar al-tali'ah, Beirut, 1979.
- Al-Khumeini (d. 1989): *Al-makasib al-muharramah*, Matba'at Mahr, Qum, 1381h.
- Al-Khumeini (d. 1989): *Kashf al-asrar*, trans. Muhammad Al-Bandari, Dar 'Ammar, Amman, 3rd edition, 1988.
- Al-Kurdi, Ahmad Al-Hijji: *Al-madkhal al-fiqhi: al-qawa'id al-kulliyyah wal-mu'ayyidat al-shar'iyyah*, Jami'at Dimashq, 7th edition, 1994-1995.
- Al-Lankarani, Muhammad Jawwad: *Risalah fil-taqiyyah*, in <http://www.lankarani.org/Arabic/najlehi/taqiye/taqiye.html>.
- Al-Luwayhiq, Jamil Habib: *Al-tashabbuh al-munha 'anh fil-fiqh al-islami*, Dar al-Andalus, Jeddah, 1999.
- Al-Mahdawi, Mustafa Kamal: *Al-Bayan bil-Qur'an, Al-dar al-jamahiyyah*, Misratah and Dar al-afaq al-jadidah, Casablanca, 1990.
- Al-Mahmasani, Subhi: *Arkan huquq al-insan, baht muqaran fil-shari'ah al-islamiyyah wal-qawanin al-hadithah*, Dar al-'ilm lil-malayin, Beirut, 1979.
- Al-Masri, Nash'at: *Al-ahadith al-qudsiyyah*, Al-mukhtar al-islami, Cairo, 1985.
- Al-Masri, Sana': *Khalf al-hijab: mawqif al-jama'ah al-islamiyyah min qadiyyat al-mar'ah*, Sina lil-nashr, Cairo, 1989.
- Al-Masri, Zakariyya 'Abd-al-Razzaq: *Ma'rifat 'ilm al-khilaf al-fiqhi qantarrah ila tahqiq al-wifaq al-islami*, Mu'assasat al-risalah, Beirut, 1990.
- Al-Mawdudi, Abu-al-A'la (d. 1997): *Al-islam fi muwajahat al-tahaddiyat al-mu'asirah*, Dar al-qalam, Kuwait, 2nd edition, 1978.
- Al-mawsu'ah al-qur'aniyyah al-mutakhassisah*, Wazarat al-awqaf, Cairo, 2003.
- Al-Mazid, Salih Muhammad Al-Fahd: *Tahqiq al-sun'ah fi bayan ahkam al-qur'an*, Matba'at al-madani, Cairo, 1992.
- Al-Muntadhiri, Husayn 'Ali: *Dirasat fi wilayat faqih*, Al-markaz al-'alami lil-dirasat al-islamiyyah, Qum, 1988.
- Al-Mutlaq, 'Abd-Allah Ibn-Muhammad: *Kitabat al-Qur'an al-karim bi-khat bryille lil-makfufin*, in *Majallat al-buhuth al-islamiyyah*, no 66, 2002, p. 337-362.
- Al-Nadawi, 'Ali Ahmad: *Al-qawa'id al-fiqhiyyah*, Dar al-qalam, Damascus, 1986.
- Al-Nadim*, Nashrat Markaz Al-Nadim lil-'ilaj wal-ta'hil al-nafsi, Cairo, 1997.

- Al-nadwah al-duwaliyyah hawl tarjamat ma'ani al-Qur'an al-karim*, Jam'iyyat al-da'wah al-islamiyyah, Tripoli (Libya), 2002.
- Al-Nasa'i (d. 915): *Sunan Al-Nasa'i*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Al-Nawawi (1277): *Adab al-fatwa wal-mufti wal-mustafti*, Dar al-fikr, Damascus, 1988.
- Al-Nimr, 'Abd-al-Mun'im: *Al-shi'ah, al-mahdi, al-duruz: tarikh wa-watha'iq*, Maktabat al-turath al-islami, Cairo, 4th edition, 1988.
- Al-Nimr, 'Abd-al-Mun'im: *Ilm al-tafsir, Dar al-kitab al-masri*, Dar al-kutub al-islamiyyah and Dar al-kitab al-lubnani, Cairo and Beirut, 1985.
- Al-Qadi Al-Nu'man (d. 974): *Da'a'im al-islam*, Dar al-adwa', Beirut, 1991.
- Al-Qadi Al-Nu'man (d. 974): *Ikhtilaf usul al-fiqh*, Dar al-Andalus, Beirut, 1983.
- Al-Qalqili, 'Abd-Allah: *Al-fatawa al-urduniyyah, qism al-ta'amul ma' al-'aduw wa-ahkam al-jihad*, Al-maktab al-islami, Beirut, 1967.
- Al-qanun al-madani, Majmu'at al-a'mal al-tahdiriyyah*, Wazarat al-'adl, Dar al-kitab al-'arabi, Cairo, 1950.
- Al-Qaradawi, Yusuf: *Al-fatwa bayn al-indibat wal-tasayyub*, Dar al-sahwah, Cairo, 1988.
- Al-Qaradawi, Yusuf: *Al-islam wal-'ilmaniyyah wajhan li-wajh*, Mu'assasat al-risalah, Beirut, 3rd edition, 1992.
- Al-Qaradawi, Yusuf: *Awlawiyyat al-harakah al-islamiyyah fil-marhalah al-qadimah*, Mu'assasat al-risalah, Beirut, 13th edition, 1992.
- Al-Qaradawi, Yusuf: *Fi fiqh al-awlawiyyat, dirasah jadidah fi daw' al-Qur'an wal-Sunnah*, Maktabat Wahbah, Cairo, 2nd edition, 1996.
- Al-Qaradawi, Yusuf: *Hajatuna ila fiqh al-awlawiyyat* sur son site: <http://www.qaradawi.net/>.
- Al-Qaradawi, Yusuf: *Min huda al-islam, fatawa mu'asirah*, Dar al-qalam, Kuwait, 3rd edition, 1987.
- Al-Qari, Ahmad Ibn 'Abd-Allah (d. 1940): *Majallat al-ahkam al-shar'iyyah*, dirasat wa-tahqiq 'Abd-al-Wahhab Abu-Sulayman and Muhammad Ibrahim Ahmad 'Ali, Tuhama, Riyadh, 1981.
- Al-Qasimi, Jamal-al-Din: *Al-fatwa fil-islam*, Dar al-kutub al-'ilmiyyah, Beirut, 1986.
- Al-Qazwini, Abu-Hatim: *Kitab al-hiyal fil-fiqh*, edited with an introduction and a translation in German by Joseph Schacht under the title: *Das kitab al-hiyal fil-fiqh (Buch der Rechtskniffe) des Abu Hatim Mahmud al-Hasan Al-Qazwini*, Orient-Buchhandlung Heinz Lafaie, Hannover, 1924.
- Al-Qurtubi (1272): *Al-jami' li-ahkam al-Qur'an*, Al-hay'ah al-masriyyah al-'ammah lil-kitab, Cairo, 1987.
- Al-Razi (d. 1209): *Al-tafsir al-kabir*, Dar ihya' al-turath al-'arabi, Beirut, 3rd edition, s.d.
- Al-Sa'di, Jamil Ibn-Khamis: *Qamus al-shari'ah*, Wazrat al-turath al-qawmi wal-thaqafah, Oman, 1984.
- Al-Saffar, Ibtisam Marhun: *Mu'jam al-dirasat al-qur'aniyyah*, Matabi' Jami'at Al-Muwsil, Mousol, 1984.

- Al-Salih, Subhi: *Mabahith fi 'ulum al-Qur'an*, Dar al-'ilm lil-malayin, Beirut, 17th edition, 1988.
- Al-Salusi, 'Ali Ahmad: *'Aqidat al-imamah fil-fiqh al-ja'fari wa-usuluh*, Al-mu'assasah al-'arabiyyah, Cairo, 2nd edition, 1982.
- Al-Salusi, 'Ali Ahmad: *Athar al-imamah 'ind al-shi'ah al-ithna 'ashar*, Dar al-'itizam, Cairo, 1987.
- Al-Samirra'i, Yunis Al-Shaykh Ibrahim: *Al-ahadith al-qudsiyyah*, Maktabat al-sharq al-jadid, Bagdad, 2nd edition, 1988.
- Al-Samman, Nabil: *Hamazat shaytaniyyah wa-Salman Rushdie*, Dar 'Ammar, Amman, 1989.
- Al-Sanhuri, 'Abd-al-Razzaq (d. 1971): *Al-wasit fi sharh al-qanun al-madani*, vol. I, Dar al-nahdah al-'arabiyyah, Cairo, 3rd edition, 1981.
- Al-Saqqa, Ahmad Hijazi: *La naskh fil-Qur'an*, Dar al-fikr al-'arabi, Cairo, 1978.
- Al-Sarakhsi (d. 1090): *Kitab al-mabsut*, Dar al-ma'rifah, Beirut, 1986.
- Al-Sarakhsi (d. 1090): *Sharh kitab al-siyar al-kabir li-Muhammad Ibn Al-Hasan Al-Shaybani*, Ma'had al-makhtutat bi-jami'at al-duwal al-'arabiyyah, Cairo, 1971.
- Al-Sarhan, Muhyi Hilal: *Al-qawa'id al-fiqhiyyah wa-dawruha fi ithra' al-tashri'at al-hadithah*, Matba'at arkan, Bagdad, 1986-87.
- Al-Shafi'i (d. 820): *Al-Risalah*, edited by Ahmad Muhammad Shakir, Dar al-turath, Cairo, 2nd edition, 1979.
- Al-Shafi'i (d. 820): *Kitab al-um*, Dar al-fikr, Beirut, 1980.
- Al-Sha'rawi, Muhammad Mitwalli (d. 1998): *Qadaya islamiyyah*, Dar al-shuruq, Beirut and Cairo, 1977.
- Al-Shawkani, Muhammad (d. 1834): *Fath al-qadir al-jami' bayn fannay al-riwayah wal-dirayah min 'ilm al-tafsir*, Dar al-ma'rifah, Beirut, 1979.
- Al-Shaybani, Ahmad Ibn-'Amru (d. 900): *Kitab al-hiyal wal-makharij*, edited by Joseph Schacht, Georg Olms, Hildesheim, 1968 (a reprint of his thesis published in 1923).
- Al-Shinnawi, Sa'd Muhammad: *Mada al-hajah lil-akhdh bi-nadhariyyat al-masalih al-mursalah fil-fiqh al-islami*, s.m., s.l., 2nd edition, 1981.
- Al-Shuwayki, Muhammad: *Al-ijma' al-mu'tabar*, Matba'at al-amal, Jerusalem, 1990.
- Al-siyasah wal-hilah 'ind al-'arab: raqa'iq al-hilal fi daqa'iq al-hiyal*, s.a., edited by René R. Khawam, Dar Al-Saqi, London, 1988.
- Al-Subhani, Ja'far: *Mafahim al-Qur'an*, vol. 4, Dar al-adwa', Beirut, 2nd edition, 1986.
- Al-Suyuti (d. 1505): *Al-itqan fi 'ulum al-Qur'an*, Al-maktabah al-thaqafiyyah, Beirut, 1973.
- Al-Suyuti (d. 1505): *Asbab al-nuzul*, en marge de *Qur'an Karim*, Dar al-Rashid, Damascus, and Mu'assasat al-iman, Beirut, 1984.
- Al-Tabari (d. 923): *Tafsir*, Dar al-fikr, Beirut, 1978.
- Al-Tabari (d. 923): *Tarikh Al-Tabari*, 'Iz-al-Din, Beirut, 3rd edition, 1992.
- Al-Tammimi, As'ad: *Zawal Isra'il hatmiyyah qur'aniyyah*, Al-Mukhtar al-islami, Cairo, s.d.

- Al-taqiyyah fil-fikr al-islami*, Markaz al-risalah, Silsilat al-kutub al-'aqa'idhiyyah, markaz al-abhath al-'aqa'idhiyyah, in www.aqaed.com/shialib/books/02/taqya.
- Al-Tirmidhi (d. 892): *Jami' Al-Tirmidhi*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Al-Tubrusi (d. 1153): *Tafsir jawami' al-jami'*, Intisharat Danishkah, Teheran, 1989.
- Al-Tufi (d. 1316): *Risalah fi ri'ayat al-maslahah*, Al-Dar al-masriyyah al-lubnaniyyah, Cairo, 1993.
- Al-Wa'i, Tawfiq Yusuf: *Al-bid'ah wal-masalih al-mursalah*, Dar al-turath, Kuwait, 1984.
- Al-Wansharisi (d. 1508): *Al-mi'yar al-mu'rib wal-jami' al-mujrib 'an fatawa ahl Afriqya wal-Andalus wal-Maghrib*, Wazarat al-awqaf, Rabat, 1981.
- Al-Wazani, Muhammad Al-Mahdi (d. 1923): *Al-nawazil al-sughra al-musammata al-minah al-samiyah fil-nawazil al-fiqhiyyah*, Wazarat al-awqaf, Rabat, 1992.
- 'Alyah, Samir: *Al-qada' wal-'urf fil-islam*, Al-mu'assasah al-jami'iyyah, Beirut, 1986.
- Al-Yubi, Muhammad Sa'd: *Maqasid al-shari'ah al-islamiyyah wa-'ilaqatuha bil-adillah al-shari'iyah*, Dar al-hijrah, Riyadh, 1998.
- Al-Zarqa', Ahmad Muhammad: *Sharh al-qawa'id al-fiqhiyyah*, Dar al-qalam, Damascus, 2nd edition, 1989.
- Al-Zarqa', Mustafa Ahmad: *Al-istislah wal-masalih al-mursalah fil-shari'ah al-islamiyyah wa-usul fiqhiha*, Dar al-qalam, Damascus, 1988.
- Al-Zarqa', Mustafa Ahmad: *Mashru' qanun al-ahwal al-shakhsiyyah al-muwahhad lil-iqlimayn al-masri wal-suri*, Dar al-qalam, Damascus and Al-Dar al-shamiyyah, Beirut, 1996.
- Al-Zarqani, Muhammad 'Abd-al-'Azim: *Manahil al-'urfan fi 'ulum al-Qur'an*, Dar al-kitab al-masri, Cairo and Dar al-kitab al-lubnani, Beirut, s.d.
- Al-Zuhayli, Wahbah: *Al-madhhab al-shafi'i*, in *Al-madhahib al-islamiyyah al-khamsah, tarikh wa-tawthiq*, Al-Ghadir, Beirut, 1998, p. 487-562.
- Al-Zuhayli, Wahbah: *Athar al-harb fil-fiqh al-islami*, Dar al-fikr, Damascus, 1983.
- An-Na'im, Abdullah Ahmed: *Toward an Islamic reformation, civil liberties, human rights, and international law*, Syracuse university press, Syracuse N. Y. 1990.
- Asbindari, 'Abd-al-Rahman 'Umar Muhammad: *Kitabat al-Qur'an al-karim fil-'ahd al-makki*, ISESCO, Rabat, 2002.
- 'Atawi, Fathiyyah Mustafa: *Al-taqiyyah fil-fikr al-islami al-shi'i*, Al-Dar al-islamiyyah, Beirut, 1993.
- 'Atiyyah, Salih Muhammad Salih: *Rasm al-mushaf, ihisa' wa-dirasah*, Jam'iyyat al-da'wah al-islamiyyah, Tripoli (Libya), 2002.
- Azzi, Joseph: *Entre la raison et le Prophète: essai sur la religion des druzes*, Jacques Bertoin, Paris, 1992.
- Badawi, 'Abd-al-Rahman: *Min tarikh al-ilhad fil-islam*, Dar Sina lil-nashr, Cairo, 2nd edition, 1993.
- Badran, Mohammed: *Korrekturen am Koran*, Code das andere deutsche Nachrischtenmagazin, no 10, October 1991, p. 40-41.
- Bagby, Ihsan Abdul-Wajid: *Utility in classical Islamic law: the concept of maslahah in usul al-fiqh*, University Microfilm international, Michigan, 1986.

- Baz, Salim Rustum: *Sharh al-majallah*, Dar ihya' al-turath al-'arabi, Beirut, 3rd edition, s.d.
- Bernard, Marie: *L'accord unanime de la communauté comme fondement des statuts légaux de l'islam d'après Abu l-Husayn Al-Basri*, Vrin, Paris, 1970.
- Bernard-Maugiron, Nathalie: *Le politique à l'épreuve du judiciaire: la justice constitutionnelle égyptienne*, Bruylant, Brussels, 2003.
- Bible de Jérusalem*, Editions du Cerf, Paris, 1984.
- Bint-al-Shati': *Qira'ah fi watha'iq al-baha'iyyah*, Markaz al-Ahram, Cairo, 1986.
- Blachère, Régis: *Introduction au Coran*, Maisonneuve and Larose, Paris, 1977.
- Blanc, François-Paul: *Le droit musulman*, Dalloz, Paris, 1995.
- Bleuchot, Hervé: *Droit musulman, tome I, Histoire*, Presse universitaires d'Aix-Marseille, Aix-en-Provence, 2000.
- Bleuchot, Hervé: *Droit musulman, tome II, Fondements, culte, droit public et mixte*, Presse universitaires d'Aix-Marseille, Aix-en-Provence, 2002.
- Bucaille, Maurice and Talbi, Mohamed: *Réflexions sur le Coran*, Editions Seghers, Paris, 1989.
- Bucaille, Maurice: *The Bible, the Qur'an and Science: the Holy Scriptures examined in the light of modern knowledge*: <http://www.kalamullah.com/Books/BibleQuranScience.pdf>.
- Buhayri, Muhammad 'Abd-al-Wahhab: *Al-hiyal fil-shari'ah al-islamiyyah*, Matba'at al-sa'adah, Cairo, 1974.
- Cardaillac, Louis: *Morisques et chrétiens, un affrontement polémique 1492-1640*, Librairie Klincksieck, Paris, 1977.
- Catéchisme des druzes: ta'lim al-din al-durzi*, bilingual edition published by Anwar Yassyn, translated by Karl Leprestre, Paris, 1985.
- Charfi, Abdelmajid: *Al-islam bayn al-risalah wal-tarikh*, Dar al-Tali'ah, Beirut, 2001.
- Charfi, Abdelmajid: *Al-islam wal-hadathah*, Al-dar al-tunisiyyah lil-nashr, Tunis, 1991.
- Charfi, Abdelmajid: *L'islam entre le message et l'histoire*, trans. André Ferré, Albin Michel, Paris, 2004.
- Charfi, Mohamed: *Al-islam wal-hurriyyah, al-iltibas al-tarikhi*, Dar al-junub, Tunis, 2002.
- Charfi, Mohamed: *Islam et liberté, le malentendu historique*, Albin Michel, Paris, 1998.
- Charles, Raymond: *Le droit musulman*, Que sais-je? PUF, Paris, 1982.
- Chehata, Chafik: *Droit musulman, application au Proche-Orient*, Dalloz, Paris, 1970.
- Chrétiens, musulmans et juifs dans l'Espagne médiévale: de la convergence à l'expulsion*, Cerf, Paris, 1994.
- Code civil turc*, edition Rizzo, Galata, Constantinople, 1928.
- Conseil européen des fatwas et de la recherche: *Recueil de fatwas, avis juridiques concernant les musulmans d'Europe*, no 1, Tawhid, Lyon, 2002.
- Constitution de la République islamique de l'Iran*, s.m., s.l., 1980.
- Coran*, trans. by Si Hamza Boubakeur, Fayard, Paris, 3rd edition, 1985.

- Cornu, Gérard: *Linguistique juridique*, Montchrestien, Paris, 1990.
- Dalil al-muslim fi bilad al-ghurbah*, Dar al-ta'aruf lil-matbu'at, Beirut, 1990.
- Da'ud, Ahmad Muhammad 'Ali: *'Ulum al-Qur'an wal-hadith*, Dar al-bashir, Amman, 1984.
- De Sacy, Silvestre: *Exposé de la religion des druzes*, 1838, reprint: Librairie Orient, Paris and Hakkeret, Amsterdam, 1964.
- De Waël, Henri: *Le droit musulman, nature et évolution*, C.H.E.A.M., Paris, 1989.
- Despagne, Pierre: *Israël, an 40: 1948-1988*, Maison de la Bible, Genève and Paris, 1988.
- Despagne, Pierre: *Le Moyen-Orient et les choses qui doivent arriver bientôt*, at the author, Cosne-sur-Loire, 7th edition, 1981.
- Encyclopédie de l'islam*, Brill, Leiden and Maisonneuve-Larose, Paris, New edition, [1975-].
- Évangile de Barnabé, recherches sur la composition et l'origine* by Luigi Cirillo, text and translation by Luigi Cirillo and Michel Frémaux, Beauchesne, Paris, 1977.
- Fatawa al-lajnah al-da'imah lil-buhuth al-'ilmiyyah wal-ifta'*, Dar al-'asimah, Riyadh, 1996.
- Fawzi, Mahmud: *Mafhum al-taqiyyah fil-islam*, Mu'assasat al-wafa, Beirut, 1985.
- Frayj, 'Ali 'Umar: *Al-shi'ah fil-tasawwur al-islami*, Dar 'Ammar, Amman, 1985.
- Gaius (d. v. 180): *Institutes*, translated by Julien Reinach, 2nd reprint, Les Belles Lettres, Paris, 1965.
- Gharizi, Wafiq: *Mu'anat al-muwahhidin al-duruz fil-aradi al-muhtallah*, Dar al-katib, Beirut, 1984.
- Ghurab, Mahmud 'Abd-al-Hamid: *Ahkam islamiyyah idanah lil-qawanin al-wad'iyyah*, Dar al-i'tisam, Cairo, 1986.
- Gilliot, Claude: *Le Coran: trois traductions récentes*, in *Studia islamica*, vol. LXXV, 1992, p. 159-177.
- Hal lil-qanun al-rumi ta'thir 'ala al-fiqh al-islami? Majmu'at dirasat*, Dar al-buhuth al-'ilmiyyah, Beirut, 1973.
- Hallaq, Wael Bahjat: *The gate of ijtihad: a study in Islamic legal history*, University Microfilms International, Ann Arbor, Michigan, 1989.
- Hamad, Ghanim Qadduri: *Rasm al-mushaf, dirasah lughawiyyah tarikhiyyah*, Al-lajnah al-wataniyyah lil-ihtifal bi-matla' al-qarn al-khamis 'ashar al-hijri, s.l., 1982.
- Hamdan, Nadhir: *Al-muwatta'at lil-imam Malik*, Dar al-qalam, Damascus and Al-Dar al-shamiyyah, Beirut, 1992.
- Hamidullah, Muhammad (d. 2002): *Documents sur la diplomatie musulmane à l'époque du Prophète et des khalifes orthodoxes*, Maisonneuve, Paris, 1935.
- Hamidullah, Muhammad (d. 2002): *Le Saint Coran*, Mu'assasat al-risalah, Beirut, 12th edition, 1986.
- Hamidullah, Muhammad (d. 2002): *Majmu'at al-watha'iq al-siyasiyyah lil-'ahd al-nabawi wal-khilafah al-rashidah*, Dar al-nafa'is, Beirut, 5th edition, 1985.
- Hammud, Muhammad Jamil: *Al-fawa'id al-bahiyyah fi sharh 'aqa'id al-imamiyyah*, Mu'assasat al-A'lami lil-matbu'at, Beirut, 2nd edition, 2001.

- Hamzah, Mahmud: *Al-fara'id al-bahiyyah fil-qawa'id wal-fawa'id al-fiqhiyyah*, Dar al-fikr, Damascus, 1986.
- Hamzah, Muhammad: *Dirasat al-ahkam wal-naskh fil-Qur'an al-karim*, Dar Qaybah, Damascus, s.d.
- Hasan, Dib 'Ali: *Ad'iya' al-nubuwwah 'abr al-tarikh*, Al-Hikmah, Damascus, 1996.
- Hassan, Husayn Hamid: *Fiqh al-maslahah wa-tatbiqatuh al-mu'asirah*, Al-bank al-islami lil-tanmiyah, Jaddah, 1993.
- Hassan, Hussein Hamid: *Jurisprudence of Maslaha and its contemporary applications*, Islamic development bank, Jeddah, 1994.
- Haydar, 'Ali: *Durar al-hukkam fi sharh majallat al-ahkam*, trans. by Fihmi Al-Husayni, Maktabat al-nahdah, Beirut, s.d.
- Hizb al-tahrir: *Muqaddimat al-dustur aw al-asbab al-muwgibah lah*, s.m., s.l., 1963.
- Hunter, W. W.: *The Indian Musalmans, are they bound in conscience to rebel against the Queen?* Reprint of 1871 edition, Premier Book House, Lahore, 1974.
- Husayn, Ahmad Faraj: *Hijjiyyat al-masalih al-mursalat fi istinbat al-ahkam al-shar'iyyah*, Mu'assasat al-thaqafah al-jami'iyah, Alexandria, 1982.
- Husayn, Taha (d. 1973): *Fil-adab al-jahili*, Dar al-ma'arif, Cairo, 12th edition, 1977.
- Husayn, Taha (d. 1973): *Fil-sh'ir al-jahili*, Dar al-kutub al-masriyyah, Cairo, 1926, reprint in *Majallat Al-Qahirah*, no 159, February 1996, p. 389-449.
- Husni, Mahmud Najib: *Sharh qanun al-'uqubat, al-qism al-'am*, Matba'at jami'at al-Qahirah, Cairo, 4th edition, 1977.
- Ibn-'Abidin, Muhammad Amin (d. 1836): *Rad al-muhtar 'ala al-dur al-mukhtar*, Dar ihya' al-turath al-'arabi, Beirut, 2nd edition, 1987.
- Ibn-al-Mundhir: *Al-ijma'*, Dar al-kutub al-'ilmiyyah, Beirut, 1985.
- Ibn-al-Salah, 'Uthman Ibn 'Abd-al-Rahman (d. 1245): *Adab al-mufti wal-mustafti*, Maktabat al-'ulum wal-hikam and 'Alam al-kutub, s.l., 1986.
- Ibn-Battah, 'Ubayd-Allah (d. 997): *Ibtal al-hiyal*, Mu'assasat al-risalah, Beirut, 1996.
- Ibn-Hajar (d. 1449): *Fath al-bari bi-sharh sahih al-imam Al-Bukhari*, Idarat al-buhuth al-'ilmiyyah, Riyadh, s.d.
- Ibn-Hazm (d. 1064): *Ma'rifat al-nasikh wal-mansukh*, en marge de *Tafsir al-Qur'an al-'adhim lil-imamayn Al-Jalalayn*, Matba'at Al-Halabi, Cairo, 1342 h.
- Ibn-Ibrahim, Muhammad: *Al-hiyal al-fiqhiyyah fil-mu'amalat al-maliyyah*, Al-dar al-'arabiyyah lil-kitab, Tunis, 1983.
- Ibn-Kathir, Isma'il (d. 1373): *Tafsir al-Qur'an al-'adhim*, Dar al-ma'rifah, Beirut, 1980.
- Ibn-Khaldun (d. 1406), *The muqaddimah*, transl. by Franz Rosenthal: <http://www.muslimphilosophy.com/ik/Muqaddimah>
- Ibn-Majah (d. 886): *Sunan Ibn-Majah*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Ibn-Nujaym (d. 1563): *Al-ashbah wal-nadha'ir*, Dar al-kutub al-'ilmiyyah, Beirut, 1980.

- Ibn-Qayyim Al-Jawziyyah (d. 1351): *I'lam al-muwaqqi'in 'an Rab al-'alamin*, Maktabat Ibn-Taymiyyah, Cairo, vol. 4, 1989.
- Ibn-Qudamah (d. 1223): *Al-mughni*, Dar al-kitab al-'arabi, Beirut, 1983.
- Ibn-Rochd (Averroes, d. 1198): *Traité décisif sur l'accord de la religion et de la philosophie*, trans. Léon Gauthier, Vrin, Paris, 1983.
- Ibn-Rushd (Averroès, d. 1198): *Bidayat al-mujtahid wa-nihayat al-muqtasid*, Dar al-kutub al-'ilmiyyah, Beirut, 1996.
- Ibn-Rushd (Averroès, d. 1198): *Bidayat al-mujtahid*, English trans. by Nyazee and Rauf, Center for Muslim contribution to civilization, Garnet Publishing, Reading (UK), 1994.
- Ibn-Rushd (d. 1126): *Kitab al-muqaddimat al-mumahhidat*, Dar Sadir, Beirut, s.d..
- Ibn-Salamah, Hibat-Allah (d. 1019): *Al-nasikh wal-mansukh*, Mustafa Al-Halabi, Cairo, 2nd edition, 1967.
- Ibn-Sirin, Hamid: *Masadir al-'aqidah al-durziyyah*, Dar li-ajl al-ma'rifah, Diyar 'aql, 1986.
- Ibn-Taymiyyah (d. 1328): *Iqamat al-dalil 'ala ibtal al-tahlil*, Maktabat Linah, Damanhur, 2nd edition, 1996.
- Ibn-Taymiyyah (d. 1328): *Majmu' fatawa shaykh al-islam Ahmad Ibn-Taymiyyah*, reprint, Dar al-'arabiyyah, Beirut, 1978.
- Ibn-Taymiyyah (d. 1328): *Minhaj al-sunnah*, texte in <http://arabic.islamicweb.com/Books/taimiya.asp?book=365>.
- Ibn-Warraaq: *Pourquoi je ne suis pas musulman*, L'âge d'homme, Lausanne, 1999.
- Iqtirah bi-mashru' qanun bi-isdar qanun al-'uqubat*, Lajnat taqnin ahkam al-shari'ah al-islamiyyah, annex 19, file of the 70th session of Majlis al-sha'b of 1st July 1982.
- Isma'il, Sha'ban Muhammad Isma'il: *Al-istihsan bayn al-nadhariyyah wal-tatbiq*, Dar al-thaqafah, Doha, 1988.
- Isma'il, Sha'ban Muhammad: *Nadhariyyat al-naskh fil-shara'i' al-samawiyyah*, Dar al-salam, Cairo, 1988.
- Jalhum, Ibrahim and Hammad, 'Abd-al-Salam: *Mu'jizat al-Rasul*, Al-Dar al-masriyyah al-lubaniyyah, Cairo, 4th edition, 2001.
- Kabbashi, Al-Mukashifi Taha: *Tatbiq al-shari'ah al-islamiyyah fil-Sudan bayn al-haqiqah wal-itharah*, Al-Zahra' lil-'ilam, Cairo, 1986.
- Khadduri, Majid: *War and peace in the Law of islam*, The Johns Hopkins Press, Baltimore and London, 1979.
- Khalaf-Allah, Muhammad Ahmad (d. 1997): *Al-Qur'an wal-dawlah*, Maktabat al-anglo-al-masriyyah, Cairo, 1973.
- Khalaf-Allah, Muhammad Ahmad (d. 1997): *Al-Qur'an wa-mushkilat hayatina al-mu'asirah*, Al-mu'assasah al-'arabiyyah lil-dirasat wal-nashr, Beirut, 1982.
- Khalaf-Allah, Muhammad Ahmad (d. 1997): *Dirasat fil-nudhum wal-tashri'at al-islamiyyah*, Maktabat al-anglo-al-masriyyah, Cairo, 1977.
- Khalifa, Rashad (d. 1990): *Quran, hadith and islam*: <http://fr.feedbooks.com/userbook/6007.pdf>.
- Khalifah, Rashad (d. 1990): *Mu'jizat al-Qur'an al-karim*, Dar al-'ilm lil-malayin, Beirut, 1983.

- Khomeini (d. 1989): *A clarification of questions*, trans. Borujerdi, Westview press, Boulder and London, 1984.
- Kitabat al-mushaf bil-latiniyyah*, in *Majallat al-buhuth al-islamiyyah*, vol.10, 1404 h., p. 11-59.
- Krawietz, Birgit: *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*, Duncker and Humblot, Berlin, 2002.
- La Beaume, Jules: *Tabwib ay al-Qur'an al-karim min an-nahiyah al-mawdu'iyyah*, Matabi' dar al-sha'b, Cairo, 2nd edition, s.d. (A commented edition by Ahmad Ibrahim Muhanna of the work of Jules La Beaume, *Le Koran analysé d'après la traduction de M. Kazimirski*, Paris, Maisonneuve, 1878, translated into Arabic by Muhammad Fu'ad 'Abd-al-Baqi, under the title: *Tafsil ayat al-Qur'an al-karim*, edition 'Isa Al-Babi Al-Halabi, Cairo, 1924).
- Le Coran*, l'Appel, trans. André Chouraqui, Laffont, Paris, 1990.
- Le Coran*, trans. Jacques Berque, Sindbad, Paris, 1990.
- Le Coran*, trans. Régis Blachère, Maisonneuve, Paris, 2 vol., 1949-1950.
- Le Coran*, trans. Régis Blachère, PUF, Paris, 9e edition, 1992.
- Le Coran*, trans. Zeinab Abdelaziz, Association mondiale de l'appel islamique, Tripoli (Libya), 2002.
- Le livre des ruses: la stratégie politique des Arabes*, trans. by René R. Khawam, Phébus, Paris, 1976
- Le Saint Coran*, trans. Muhammad Hamidullah with the collaboration of M. Léturmy, Mu'assasat al-risalah, Beirut, 12th edition revised and completed, 1986.
- Levrat, Jacques: *Une expérience de dialogue, les centres d'étude chrétiens en monde musulman*, Christlich-Islamisches Schrifttum, Altenberg, 1987.
- Lewis, Bernard: *La situation des populations musulmanes dans un régime non-musulman, réflexions juridiques et historiques*, in Lewis Bernard and Schnapper, Dominique: *Musulmans en Europe*, Poitiers, Actes Sud, 1992, p. 11-34.
- Luxenberg, Christoph: *Die Syro-Aramäische Lesart des Koran, ein Beitrag zur Entschlüsselung der Koransprache*, Das Arabische Buch, Berlin, 2000.
- Ma'ani al-Qur'an al-karim, tafsir lughawi muwjaz*, Jam'iyyat al-da'wah al-islamiyyah al-'alamiyyah, Tripoli (Libya), 2001.
- Mahmassani, Subhi Rajab: *The philosophy of jurisprudence in Islam*, translated by Farhat J. Ziadeh, Brill, Leiden, 1961.
- Mahmoud, Mustafa: *Dialogue avec un ami athée*, trans. by Marc Chartier, Dar al-maaref, Cairo, 2nd edition, 1982.
- Mahmud, Mustafa: *Al-Qur'an, muhawalah li-fihm 'asri*, Dar al-ma'arif, Cairo, 5th edition, 1987.
- Mahmud, Zaki Najib (d. 1993): *Al-ma'qul wal-la ma'qul*, Dar al-shuruq, Beirut and Cairo, 1976.
- Mahmud, Zaki Najib (d. 1993): *Tajdid al-fikr al-'arabi*, Dar al-shuruq, Beirut and Cairo, 1974.
- Mahmud, Zaki Najib (d. 1993): *Thaqafatuna fi muwajahat al-'asr*, Dar al-shuruq, Beirut and Cairo, 1976.

- Mahmud, Zaki Najib: *Hatha al-'asr wa-thaqafatuh*, Dar al-shuruq, Beirut and Cairo, 1980.
- Mahmud, Zaki Najib: *Qiyam min al-turath*, Dar al-shuruq, Beirut and Cairo, 2nd edition, 1989.
- Mahmud, Zaki Najib: *Ru'yah islamiyyah*, Dar al-shuruq, Beirut and Cairo, 1987.
- Maimonides, Moses (d. 1204): *The book of knowledge*, transl. Russell and Weinberg, Royal College of Physicians, Edinburgh, 1981.
- Makarim, Sami Nasib: *Adwa' 'ala masalik al-tawhid*, Dar Sadir, Beirut, 1966.
- Mal-Allah, Muhammad: *Al-Shi'ah wa-tahrif al-Qur'an*, Al-Maktabah al-islamiyyah, Amman, new edition, 1985.
- Malgo, Wim: *Jérusalem aboutissement de tous les chemins*, Édition Mitternachtsruf, Pfäffikon, s.d.
- Malgo, Wim: *Que dit la Bible sur la fin du monde*, Edition Mitternachtsruf, Pfäffikon, 1983.
- Malik (d. 795): *Muwatta' Malik*, CD Al-'alamiyyah, Beirut, 1991-1996.
- Mallat, Chibli: *From Islamic to Middle Eastern law, A restatement of the field*, in *American Journal of Comparative Law*, Part I: vol. 51, 2003, p. 699-750, and Part II: vol. 52, 2004, p. 209-286.
- Mansour, Camille: *L'autorité dans la pensée musulmane, le concept d'ijma' (consensus) et la problématique de l'autorité*, Vrin, Paris, 1975.
- Marayati, Muhammad (et al.): *'Ilm al-ta'miyah wa istikhraj al-mu'amma 'ind al-'arab*, Majma' al-lughah al-'arabiyyah, Damascus, 1987.
- Masud, Muhammad Khalid: *The obligation to migrate: the doctrine of hijra in islamic law*, in Dale F. Eickelman and James Piscatori (éd.): *Muslim travellers: pilgrimage, migration, and the religious imagination*, Routledge, London, 1990, p. 29-49.
- Mawerdi (d. 1058): *Les statuts gouvernementaux*, Le Sycomore, Paris, 1982.
- Mawlawi, Faysal: *Al-usus al-shar'iyyah lil-'ilaqat bayn al-muslimin wa-ghayr al-muslimin*, Dar al-irshad al-islamiyyah, Beirut, 1988.
- Mawsu'at 'ulum al-hadith al-sharif, Wazarat al-awqaf, Cairo, 2003.
- Milliot, Louis and Blanc, François-Paul: *Introduction à l'étude du droit musulman*, Sirey, Paris, 2nd edition, 1987.
- Moro, Muhammad: *Ilmaniyyun wa-khawanah*, Al-Rawdah, Cairo, 1996.
- Muhakamat Taha Husayn, Al-mu'assasah al-'arabiyyah lil-dirasat wal-nashr, Beirut, 1972.
- Muhammad, 'Abd-al-Qadir: *Al-ijma' fil-fikr al-siyasi al-islami wal-mu'asir*, Kul-liyyat al-huquq d'Ain Shams, Cairo, 1979.
- Muhammad, Mustafa Muhammad: *Al-fihras al-mawdu'i li-ayat al-Qur'an al-karim*, Dar 'Ammar, Amman and Dar al-jil, Beirut, 4th edition, 1989.
- Muhanna, Ahmad Ibrahim: *Dirasah hawl tarjamat al-Qur'an al-karim*, Matbu'at al-Sha'b, Cairo, 1978,.
- Muslim (d. 874): *Sahih Muslim*, CD Al-'alamiyyah, Beirut, 1991-1996.
- 'Odah, 'Abd-al-Qadir (d. 1954): *Al-islam wa-awda'una al-qanuniyyah*, Al-mukhtar al-islami, Cairo, 5th edition, 1977.

- Pellat, Charles: *Ibn Al-Muqaffa' mort vers 140/757, Conseiller du Calife, (Text and trans. of Risala fil-Sahaba)*, Maisonneuve and Larose, Paris, 1976.
- Qadri Pacha, Muhammad (d. 1888): *Al-Ahkam al-shar'iyyah fil-ahwal al-shakhsiyyah 'ala madhhab al-imam Abi-Hanifah Al-Nu'man*, Matba'at Hindiyah, Cairo, 4th edition, 1900.
- Qadri Pacha, Muhammad (d. 1888): *Murshid al-hayran ila ma'rifat ahwal al-insan fil-mu'amalat al-shar'iyyah 'ala madhhab al-imam al-a'dham Abi-Hanifah Al-Nu'man*, Al-matba'ah al-amiriyyah, Cairo, 5th edition, 1933.
- Quesada, Miguel-Angel Ladero: *La population mudéjare, état de la question et documentation chrétienne en Castille*, in *Minorités religieuses dans l'Espagne médiévale*, Revue du Monde musulman et de la Méditerranée, no 63-64, 1992/1-2, p. 131-142.
- Qur'an Karim, Mushaf al-shuruq*, Dar al-shuruq, Cairo and Beirut, 1988.
- Qutb, Sayyid (d. 1966): *Fi dhilal al-Qur'an*, Dar al-shuruq, Beirut, 10th edition, 1981.
- Rasa'il al-hikmah*, Dar li-ajl al-ma'rifah, Diyar 'aql, 5th edition, 1986.
- Rasa'il ikhwan al-safa wa-khillan al-wafa*, Maktab al-i'lam al-islami, Qum, 1405 h.
- Riad, Fouad: *Pour un code européen de droit musulman*, in *Le statut personnel des musulmans, droit comparé et droit international privé*, under the direction of Jean-Yves Carlier and Michel Verwilghen, Brussels, 1992, p. 379-382.
- Rida, Muhammad Rashid (1935): *Fatawa*, Dar al-kitab al-jadid, Beirut, 1970.
- Rishi, Muhammad Wafa: *Al-madhhab al-hanafî*, in *Al-madhahib al-islamiyyah al-khamsah, tarikh wa-tawthiq*, Al-Ghadi, Beirut, 1998, p. 193-376.
- Rodinson, Maxime (d. 2004): *Mahomet*, Seuil, Paris, 2nd edition, 1967.
- Roland, Henri; Boyer; Laurent: *Adages du droit français*, Litec, Paris, 4th edition, 1999.
- Rushdie, Salman: *Les versets sataniques*, French trans. by A. Nasier, Christian Bourgois, Paris, 1989.
- Sabbagh, Leila: *La religion des Moriscos entre deux fatwas*, in *Les Morisques et leur temps*, CNRS, Paris, 1983, p. 43-56.
- Sabbah, Messod and Roger: *Les secrets de l'exode: origine égyptienne des hébreux*, Godefroy, Paris, 2000.
- Sabih, Muhammad: *Bahth jadid 'an al-Qur'an al-karim*, Dar al-shuruq, Cairo, 8th edition, 1983.
- Sa'id, Labib: *Al-jam' al-sawti al-awwal lil-Qur'an aw al-mushaf al-murattal*, Dar al-ma'arif, Cairo, 2nd edition, s.d.
- Salam, 'Atif: *Al-wihdah al-'aqa'idiyyah 'ind al-sunnah wal-shi'ah*, Dar al-balaghah, Beirut, 1987.
- Salamah, Ahmad 'Abd-al-Karim: *Mabadi' al-qanun al-duwali al-islami al-muqaran*, Dar al-nahdah al-'arabiyyah, Cairo, 1989.
- Saqr, Nadia Husni: *Al-saba'iyyah akhtar al-harakat al-haddamah fi sadr al-islam*, Al-Nahdah al-masriyyah, Cairo, 1991.
- Savvas Pacha: *Étude sur la théorie du droit musulman*, Marchal and Billard, Paris, part 1, 1892 and part 2, 1898.
- Sfar, Mondher: *Le Coran est-il authentique?*, Sfar Editions, Paris, 2000.

- Shafi'i (d. 820): *Islamic Jurisprudence, Shafi'i's Risala*, trans. Majid Khadduri, John Hopkins Press, Baltimore, 1961.
- Shafi'i (d. 820): *La risala: les fondements du droit musulman*, trans. Lakhdar Souami, Sindbad, Paris, 1997.
- Sha't, Ahmad Kamal: *Al-shi'ah falsafah wa-tarikh*, Maktbat Madbuli, Cairo, 1994.
- Sirri, Hasan: *Al-rasm al-'uthmani lil-mushaf al-sharif*, Markaz al-iskandariyyah lil-kitab, Alexandria, 1998.
- Suwayd, Muhammad: *Al-madhahib al-islamiyyah al-khamsah wal-madhab al-muwahhad*, Dar al-taqrib bayn al-madhahib al-islamiyyah, Beirut, 1995.
- Ta'dil dustur jumhuriyyat Masr al-'arabiyyah*, Majlis al-sha'b, al-matabi' al-amiriyyah, Cairo, 1980.
- Taha, Mahmud Muhammad (1985): *Al-risalah al-thaniyah min al-islam*, s.m., Umdurman, 6th edition, Nov. 1986.
- Taha, Mahmud Muhammad (1985): *Tatwir shari'at al-ahwal al-shakhsiyyah*, s.m., Umdurman, 3rd edition, 1979.
- Taha, Mahmud Muhammad (1985): *The second message of islam*, trans. and introd. by An-Na'im, Syracuse university press, Syracuse N.Y. 1987.
- Tisser, C. R., Demetriades, D. G., Effendi, Ismail Haqqi: *The Mejelle, being an English translation of Majallhel-ahkam-i-adliya and a complete code of islamic civil law*, Law publishing, Lahore, 1980, reprint of the 1901 edition.
- Tupuliak, Sulayman Muhammad: *Al-ahkam al-siyasiyyah lil-aqalliyyat al-muslimah fil-fiqh al-islami*, Dar al-nafa'is, Amman and Dar al-bayariq, Beirut, 1997.
- Turki, Abdel-Magid: *Consultation juridique d'Al-Imam Al-Mazari sur le cas des musulmans vivant en Sicile sous l'autorité des Normands*, in *Mélanges de l'Université St-Joseph*, Beirut, 1980, p. 691-704.
- Tyan, Émile: *Histoire de l'organisation judiciaire en pays d'islam*, Brill, Leiden, 2nd edition, 1960.
- Tyan, Émile: *Le système de responsabilité délictuelle en droit musulman*, Imprimerie catholique, Beirut, 1926.
- Ukdhbat tahrif al-Qur'an bayn Al-Shi'ah wal-Sunnah*, s.a., s.m., s.l, s.d.
- 'Umar, Ahmad Mukhtar and Makram, 'Abd-al-'Al Salim: *Mu'jam al-qira'at al-qur'aniyyah ma' muqaddimah fil-qira'at wa-ashhar al-qurra'*, Matbu'at jami'at al-Kuwayt, Kuwait, 2nd edition, 1988.
- 'Umar, Ibrahim 'Ali: *Al-Qur'an al-karim, tarikhu wa-adabuh*, Maktabat al-falah, Kuwait, 1984.
- Wafa, Muhammad: *Ahkam al-naskh fil-shari'ah al-islamiyyah*, Dar al-tiba'ah al-muhammadiyyah, Cairo, 1984.
- Walsch, J. R.: *Fatwa*, in *Encyclopédie de l'islam*, Brill, Maisonneuve and Larose, Leyde and Paris, new edition, 1977, vol. II, p. 886-887.
- Watt, W. Montgomery: *Muhammad prophet and statesman*, Oxford University Press, London, 1961.
- Yasin, 'Abd-al-Jawwad: *Muqaddimah fi fiqh al-jahiliyyah al-mu'asirah*, Al-Zahra' lil-I'lam al-'arabi, Cairo, 1986.

- Yassyn, Anwar (et al.): *Bayn al-'aql wal-nabi, bahth fil-'aqidah al-durziyyah*, Dar li-ajl al-ma'rifah, Diyar 'aql, 6th edition, 1986.
- Yassyn, Anwar: *Al-'aqidah al-durziyyah*, s.m., Paris, 1985.
- Yassyn, Anwar: *Al-nabi Muhammad fil-'aqidah al-durziyyah: Muhammad dans la religion Druze*, bilingual edition, s.m., Paris, 1985.
- Yassyn, Anwar: *Al-suluk al-durzi*, Dar li-ajl al-ma'rifah, Diyar 'aql, 5th edition, 1986.
- Young George: *Corps de droit ottoman*, vol. 6: Code civil ottoman, Clarendon Press, Oxford, 1906, p. 169-446.
- Yunis, Muhammad Kabir: *Dirasat fil usul al-tafsir, Kulliyyat al-da'wah al-islamiyyah*, Tripoli (Libya), 2002.
- Zakariya, Fouad: *Laïcité ou islamisme, les Arabes à l'heure du choix*, trans. and presented by Richard Jacquemond, La découverte and Al-fikr, Paris and Cairo, 1991.
- Zakariyya, Fu'ad: *Al-haqiqah wal-wahm fil-harakah al-islamiyyah al-mu'asirah*, Dar al-fikr, Cairo and Paris, 3rd edition, 1988.
- Zakariyya, Fu'ad: *Al-sahwah al-islamiyyah fi mizan al-'aql*, Dar al-fikr, Cairo and Paris, 1989.
- Zaki, Husayn Muhammad: *Al-qawl al-fasl fil-rad 'ala mahazil Mahmud Muhammad Taha*, Dar al-rihab, Alexandria, 2nd edition, 1406h.
- Zayd, Mustafa: *Al-maslahah fil-tashri' al-islami wa-Nijm-al-Din Al-Tufi*, Dar al-fikr al-'arabi, Cairo, 2nd edition, 1964.
- Zaydan, 'Abd-al-Karim: *Al-wajiz fi sharh al-qawa'id al-fiqhiyyah fil-shari'ah al-islamiyyah*, Mu'assasat al-risalah, Beirut, 1997.

Table of contents

General observations	5
Introduction	7
Part I. The legislator	9
Chapter I. Legislative competence belongs to God	9
I. The divine origin of law	9
1) The Jewish concept	9
2) The Christian concept	10
3) The Muslim concept	10
4) Absence of the concept of the sovereignty of the people	13
II. Can man make laws?	15
III. Amalgamation between law and religion	18
1) Religion	18
2) <i>Shari'ah</i>	18
3) <i>Fiqh</i>	19
4) <i>Shari'ah</i> and <i>Qanun</i>	20
5) Amalgamation and individual liberty	21
Chapter II. The role of the State and legal schools	22
I. A State without legislative power	22
1) Separation between law and the State	22
2) Divisions within the Muslim <i>ummah</i>	22
II. Schools of Sunnite persuasion	23
1) The Hanafite School	23
2) The Malikite School	25
3) The Shafi'ite School	27
4) The Hanbalite School	27
III. Schools of Shi'ite persuasion	29
1) The Ja'farite School	29
2) The Zaydite School	31
3) The Isma'ili School	32
4) The Druze School	34
IV. Schools of the Kharijite faction: the Ibadite School	35
V. Schools that have disappeared	36
1) Al-Awza'i School	36
2) The Dhahirite School	36
3) The School of Al-Tabari	37
VI. Convergences and divergences between the schools	37
VII. Attempts at the unification of schools	40
1) Past attempts	40
2) Attempts at unifying the teachings of individual schools	40
3) Attempts at syncretism in the context of States	41
4) Attempt at syncretism in the supranational context	43
5) The scope of the unification	45
VIII. Dependence or autonomy of Islamic law	45
Chapter III. Maintaining laws of other communities	47
I. People of the Book (<i>ahl al-kitab</i>)	47

1) Toleration of monotheistic communities	47
2) The system of personality of law	49
II. The People of the Book in Arabia	50
III. Polytheists	51
IV. Apostates	51
Part II. Sources of Islamic law	53
Preliminary remarks	53
Chapter I. The Koran	54
I. Description of the Koran	55
1) Historical references	55
2) Koran, the revealed text	55
3) The Koranic text	62
II. Koran as the source of law	84
1) The obligatory character of the Koran	84
2) Authentication of the Koran	86
III. Koranic norms	100
1) Normative content of the Koran	100
2) Classifications of Koranic norms according to their clarity	101
3) Apparent norms and occult norms	102
4) Norms incorporated in Koranic narrations	104
5) Clear norms and equivocal norms	105
6) Koran as the standard of measure for other sources	108
IV. Exegesis of the Koran (<i>tafsir</i>)	108
1) The meaning of exegesis	108
2) Traditionalist exegesis	109
3) Rational exegeses	110
4) Esoteric exegeses	110
5) Thematic exegeses	111
6) Selected exegesis	111
7) Linguistic exegesis	111
Chapter II. The <i>Sunnah</i>	111
I. Formal description of the <i>Sunnah</i>	112
1) Definition	112
2) Collection of the <i>Sunnah</i>	112
3) Analysis of the <i>Sunnah</i>	114
4) Classification of the <i>Hadiths</i>	116
II. <i>Sunnah</i> , the second source of law	120
1) Legitimacy of the recourse to the <i>Sunnah</i>	120
2) Infallibility of the Prophet	122
3) Function of the <i>Sunnah</i>	124
III. <i>Sunnah</i> put into question	126
Chapter III. The <i>Sunnah</i> of the companions of Muhammad	129
I. Determining the companions	130
II. Legitimacy of the recourse to the <i>Sunnah</i> of the companions	130
III. The <i>Sunnah</i> of the companions put into question	131
Chapter IV. The <i>Sunnah</i> of the people of the house of the Prophet	132
I. Infallibility of the People of the Household of the Prophet	133
II. Determining members of the People of the House of Muhammad	134
Chapter V. Laws revealed before Muhammad	134
I. Necessity of believing in all the prophets	135

1) God sends the prophets	135
2) Laws revealed before Muhammad have been falsified	136
II. Status of the laws revealed before Muhammad	138
1) Preservation of the laws of religious communities	138
2) Muslims and laws revealed before Muhammad	138
3) Laws revealed before Muhammad mentioned in the Koran and the <i>Sunnah</i>	139
4) Practical implications of the laws revealed before Islam	140
Chapter VI. Custom	142
I. Definition of custom	142
II. Legitimation of the recourse to custom	143
III. Conditions for the recourse to custom	144
1) Non-violation of the text of the Koran or the <i>Sunnah</i>	144
2) Being general (<i>muttaridah</i>)	145
3) Existing at the time of the juridical rapport	145
4) Not being contrary to the accord of the parties	145
IV. Classification of customs	145
1) Verbal and factual custom	145
2) Special and general custom	146
3) Licit, illicit and necessary custom	146
Chapter VII. Rational effort (<i>ijtihad</i>)	147
I. Definition	147
II. Legitimization of the recourse to <i>ijtihad</i>	147
1) Arguments of the adversaries	147
2) Arguments of the partisans	148
3) <i>Ijtihad</i> of Muhammad	150
III. Conditions for <i>ijtihad</i>	151
1) Conditions related to the <i>mujtahid</i>	151
2) Conditions related to the content of <i>ijtihad</i>	152
3) Imitation	154
4) Divergences in <i>ijtihad</i>	156
5) Turnabout in <i>ijtihad</i>	157
IV. <i>Fatwa</i> as domain of <i>ijtihad</i>	158
1) Meaning and importance of the <i>fatwa</i>	159
2) Rules governing the institution of the <i>mufti</i>	162
3) Modern role of the <i>mufti</i> in Muslim countries	168
4) Influence of <i>muftis</i> on non-Muslim countries	172
V. Consensus (<i>ijma'</i>)	174
1) Definition of consensus	174
2) Legitimacy of having recourse to consensus	175
3) Protagonists of consensus	177
4) Domain of consensus	178
5) Relevance of consensus in time and space	178
6) Possibility of reaching consensus	179
Chapter VIII. Tools of rational effort (<i>ijtihad</i>)	180
I. Analogy (<i>qiyas</i>)	180
1) Definition of analogy	180
2) Legitimacy of recourse to analogy	181
3) Conditions for recourse to analogy	184
4) Types of analogy	185
5) Determination of reason of law and recourse to analogy	187

II. Unregulated interests (<i>masalih mursalah</i>)	187
1) Definition	187
2) Legitimization of recourse to unregulated interests	188
3) Conditions for recourse to unregulated interests	190
4) Unregulated interests and admission of Western laws	191
III. Juridical preference (<i>istihsan</i>)	192
1) Definition	192
2) Legitimacy of recourse to juridical preference	192
3) Conditions for recourse to juridical preference	196
IV. Presumption of continuity (<i>istishab</i>)	196
1) Definition	196
2) Classification of the presumption of continuity	196
V. Drawing lots	197
1) Legitimacy of recourse to drawing lots	197
2) Domains of the application of drawing lots	198
Chapter IX. Rules and juridical adages	199
I. Juridical rules in the West	199
II. Juridical rules in Islamic law	200
III. Juridical rules in modern Arab codes	209
Part III. Implementation of the norms	211
Chapter I. Conflicts between sources	211
I. Abrogation (<i>naskh</i>)	211
1) Possibility and negation of abrogation	212
2) Abrogation in other religions	212
3) Abrogation of the other religions by Islam	213
4) Abrogation in the Koran	214
5) Abrogation in the relationship between the Koran and the <i>Sunnah</i>	218
6) Multiple abrogations	220
7) Abrogation in the relationship between consensus, the Koran and the <i>Sunnah</i>	220
8) Abrogation in the relationship between analogy and the hadith of Muhammad	221
9) Abrogation in the relationship between the non-regulated interests and other sources	222
10) Determination of the abrogating and the abrogated	224
II. Conciliation of the norms	224
III. Texts which cannot be abrogated or conciliated	225
1) Texts providing fundamental norms	225
2) Definitive texts	226
3) Texts referring to past events	226
Chapter II. Linguistic interpretation	226
I. Proof of language	227
II. Etymological meaning and technical meaning	228
III. Classification of terms according to meaning	228
1) Specific meaning	228
2) General (<i>'am</i>) meaning	230
3) Multiple (<i>mushtarak</i>) meanings	232
IV. Classification of terms according to context	234
1) Proper (<i>haqiqi</i>) meaning and figurative (<i>majaz</i>) meaning	234
2) Direct meaning (<i>sarih</i>) and circumlocutional (<i>kinayah</i>) meaning	234
V. Classification of terms according to the degree of clarity of their meaning	235

1) Terms with an apparent (<i>dhahir</i>) meaning	235
2) Terms with a contextual (<i>nassi</i>) meaning	235
3) Terms with an explained (<i>mufassar</i>) meaning or precise meaning	235
4) Terms with a decisive (<i>muhkam</i>) meaning	236
5) Implications for the different categories	236
VI. Classification of terms according to the degree of the obscurity of their meaning (<i>khafi al-dalalah</i>)	237
1) Terms with a hidden (<i>khafiy</i>) meaning	237
2) Terms with an equivocal (<i>mushkil</i>) meaning	238
3) Terms with a succinct (<i>mujmal</i>) meaning	238
4) Terms with an ambiguous (<i>mutashabih</i>) meaning	239
VII. Classification of terms according to their scope	239
1) Literal, explicit meaning (<i>dalil al-ibarah</i>)	240
2) Implicit meaning (<i>dalil al-isharah</i>)	240
3) Symbolical meaning (<i>dalil al-nas</i>)	240
4) Contextual meaning (<i>dalil al-muqtada</i>)	241
5) The conflict between the different meanings	241
VIII. Classification of imperative forms	241
1) Positive imperative form	242
2) Negative imperative form	243
IX. Juridical rules related to form	243
1) A word should be construed as having some meaning, rather than disregarded	243
2) Priority of the creation of a new situation over emphasis	244
3) No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is a necessity for speech	244
Chapter III. Objectives of Islamic law	246
I. Importance of the objectives	246
II. Objectives of Islamic law; negation and affirmation	246
III. Classification of interests	247
1) Indispensable Interests (<i>masalih daruriyyah</i>)	247
2) Necessary interests (<i>masalih hajiyyah</i>)	248
3) Interests for improvement (<i>masalih tahsiniyyah</i>)	248
4) Hierarchy of interests	249
IV. Norms without apparent objective	249
V. Merging advantage and disadvantage in the realization of the objectives of law	250
VI. Intention in the realization of the objectives of law	252
VII. What entails a duty is binding and what entails a prohibition is prohibited	254
1) What entails a duty is binding	254
2) What entails a prohibition is prohibited	254
Chapter IV. The content of the norm	256
I. Qualification of an act foreseen by a norm	256
1) The obligatory act (<i>wajib, fard</i>)	256
2) The recommended act (<i>mustahab, mandub, sunnah</i>)	259
3) Forbidden acts (<i>haram, mahdhur</i>)	260
4) Disapproved or reprehensible acts (<i>makruh</i>)	262
5) Permitted acts, licit (<i>mubah, halal, ja'iz</i>)	262
6) The classification of the Hanafites	263
7) Al-Shatibi's classification	263

8) Circumstances of qualification	264
II. Constitutive elements of an act	264
1) Cause (<i>sabab</i>)	264
2) Condition (<i>shart</i>)	265
3) Impediment (<i>mani'</i>)	267
4) Validity and invalidity of acts	267
III. Object of the norm (<i>al-mahkum fih</i>)	268
1) Precise and possible objects of the norm	268
2) Interpretation of impossible norms	268
Chapter V. The addressees and beneficiaries of norms	269
I. Addressees of norms	269
1) Comprehension (<i>fihm</i>) of the language of law	269
2) Capacity (<i>ahliyyah</i>)	270
3) Non-impediment of the capacity	272
4) Delegation of responsibilities imposed by the norm	279
II. The beneficiary of the norms	279
1) Rights reserved to God	280
2) Rights exclusively for the individual	281
3) Rights belonging to God and to the individual with the prevalence of God's right	281
4) Rights belonging to God and to the individual with the prevalence of the right of the individual	281
Chapter VI. The mitigation of the norm	282
I. Exemption (<i>rukhsah</i>)	282
II. Ruse (<i>hilah</i>)	284
1) Negative attitude towards ruses	284
2) Legitimization of the recourse to ruse	285
3) Classification of the ruses	287
4) Technique of ruse	289
III. Dissimulation (<i>taqiyyah</i>)	291
1) Dissimulation among the Ja'farite Shi'ites	292
2) Dissimulation of doctrine among esoteric groups	305
IV. Weighing up interests and the choice of priorities	314
1) Importance of priorities	314
2) Everything has its own time	315
3) Respecting the priorities	315
4) Priority of quality over quantity	316
5) Priority of knowledge over action	316
6) Priority of convenience over hardship in religion	317
7) Priority in actions	318
Part IV. Implementation of Islamic law in time and space	321
Chapter I. Implementation of Islamic law in Muslim countries	321
I. Appropriation of legislative power by the State	321
1) Codifications of Islamic law and adoption of foreign laws	321
2) Vestiges of Islamic law	323
II. Islamist resistance	327
1) Refusal of the adoption of foreign laws and the resurgence of Islamic law	327
2) Refusal of the implementation of foreign laws	330
3) Position of the constitutional court	330
4) Tentatives of codification	333

5) The tactic of priorities	338
III. Opposition of the liberals	338
1) Muhammad Sa'id Al-'Ashmawi	339
2) Fu'ad Zakariyya	343
3) Mahmud Muhammad Taha	346
4) Muhammad Ahmad Khalaf-Allah	349
5) Abdelmajid Charfi	351
6) Mohamed Charfi	354
7) Zaki Najib Mahmud	360
8) Husayn Fawzi	363
9) Attacks of Islamists against lay people	364
Chapter II. Implementation of Islamic law outside Muslim countries	367
I. Abode of Islam and Abode of War	367
II. Classical religious boundary and migration	369
III. Today's religious boundaries	372
IV. Religious boundaries and today's migration	374
V. Naturalization of Muslims	383
VI. Scale of priorities in the West	387
Part V. Analytical legal table of the Koran	391
I. Religious vision of the world	393
II. Sources of Islamic law	394
III. General principles of law	398
IV. Political power	399
V. Pillars of Islam	401
VI. Family and succession law	403
VII. Contractual law	409
VIII. Penal law	410
IX. Fundamental rights	419
X. Socio-economic laws	423
XI. Procedural law	427
XII. International relations and law of war	428
Bibliography	433
Table of contents	453